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RESTRICTIVE COVENANTS AS APPLIED TO TERRITORIAL RIGHTS IN PATENTED ARTICLES.

A RECENT decision of the Supreme Court of the United States has settled a question which has been much discussed in the Circuit Courts. In *Keeler v. Standard Folding Bed Co.*,¹ the Supreme Court has gone a step beyond its own decision in *Hobbie v. Jennison*,² and has held that one who buys a patented article in one part of the United States of a person licensed to sell it there may sell it as well as use it in any other part. The doctrine that a patented article once sold is free from the monopoly was applied to a case in which the purchaser bought in one State for the purpose of selling in another in which he knew his vendor had no right to sell. It was the case of a dealer in Massachusetts who knew that the right to use and sell the patented article there belonged to another, and yet sent to Michigan and bought the goods there for the purpose of resale in Massachusetts, and sold them here in defiance of the licensee for Massachusetts. It had already been decided in *Hobbie v. Jennison*, that the assignee of a given territory cannot maintain a suit for infringement against one who sells patented articles within his own district with the knowledge that they are to be used in territory of the plaintiff. The court followed its own decision in *Adams v. Burke*, made in 1873,³ and said that it was established by that case

¹ 157 U. S. 659, April 8, 1895.

² 17 Wall. 453.

³ 149 U. S. 355, May 10, 1893.

that "the sale of a patented article by an assignee within his own territory carries the right to use it everywhere, notwithstanding the knowledge of both parties that a use outside of the territory was intended." This principle has now been applied to a case in which the sale was made to a dealer who purchased for the purpose of making a business of selling the articles within the territory of another, and not merely for the purpose of using them there.

The question, as I have said, is one that has been much discussed in the Circuit Courts, and the decision in *Adams v. Burke* was not generally accepted as settling the law. The vigorous dissenting opinion of Mr. Justice Bradley, with whom Swayne and Strong, JJ., concurred, was thought by many of the Circuit judges to be sound in principle, and the injustice resulting from the application of the doctrine of the court to the cases in hand led them to distinguish and to doubt the decision, and to suggest that, if the question should be argued again before the Supreme Court the dissenting opinion would prevail. The decision, moreover, made a distinction between the right to use and the right to make and sell, and went no further than to declare that upon the sale of an article the sole value of which is in its use the purchaser acquired a right to use which was unlimited in place as well as in time.

In *Hatch v. Adams*, argued before Judge McKennan and Judge Butler,¹ in 1884, the question was whether one who purchased a patented article in New York from one who had acquired the right to sell there, and not in Philadelphia, could sell it in the course of trade in Philadelphia to dealers there. Judge McKennan said the patent act authorized a patentee to divide up his monopoly into territorial parcels, and to grant to others an exclusive right under the patent to the whole or any part of the United States, and that a grantee taking a limited right could not exercise it outside of his territory, nor grant to others the right to do so. The decision in *Adams v. Burke*, he said, was that the unrestricted sale of a patented article carries with it the right to its unlimited use and that the reason on which the rule rests involves a plain distinction between the right to use and the right to manufacture and sell an invention; and he came to the conclusion that, even in view of this case, a sale of patented articles, in the ordinary course

¹ 22 Fed. Rep. 434, U. S. Circuit Court, E. D. Penn., Oct. 29, 1884. That Judge Butler took part in this case and concurred in the opinion appears from a remark in his opinion in *Sheldon Axle Co. v. Standard Axle Works*, 37 Fed. Rep. 791.

of trade, outside the territorial limits to which the right to sell is restricted by the patentee's grant, is unwarranted.

In *Hatch v. Hall*,¹ a suit in New York relating to the same patent, Judge McKennan's opinion was referred to with approval by Judge Wheeler, and a preliminary injunction was granted against the sale of the patented articles by the defendant outside of his own territory, but was not allowed as to sales made within his territory on the mere allegation that purchasers might take them for sale into the territory of the complainant; and in the same case, on final hearing,² it was held that the defendant should be restrained, not only from selling within the territory of the complainant, but also from making sales to persons who purchased of him in his own territory for the purpose of selling within that of the complainant. With respect to *Adams v. Burke*, the judge said: "That case is to be followed here, of course, as far as it went, while it stands. It leaves the defendant the right to sell within his territory for more use outside. But it was carefully limited to what was necessary to be decided and did not go beyond the mere use in question. It falls far short of holding that a purchaser from an owner of a territorial right within the territory could sell outside without infringing upon the rights of the owner of that territory."

In *Sheldon Axle Co. v. Standard Axle Works*,³ Judge Butler limited the decision in *Adams v. Burke* to a question of the construction of the assignment, and distinguished that case from one in which the plaintiff held the first assignment of a territorial right and the defendant took with notice of it. He held that the defendant, having notice of the grant to the plaintiff, could not even use the patented article within his territory, although it was purchased elsewhere. Just at this time the case of the *Standard Folding Bed Co.* came before Judge Colt, in Massachusetts,⁴ and he also distinguished *Adams v. Burke*. He said the decision was expressly limited to the right to use, and that even with this restriction the court were divided in opinion; and he said he agreed with the conclusion of Judge McKennan in *Hatch v. Adams*, and held that the purchaser of a patented article from the assignee of a certain defined territory was not at liberty to sell it in the

¹ 22 Fed. Rep. 438, U. S. Circuit Court, E. D. N. Y., Dec. 4, 1884.

² *Hatch v. Hall*, 30 Fed. Rep. 613, April 26, 1887.

³ 37 Fed. Rep. 789, U. S. Circuit Court, E. D. Penn., Feb. 21, 1889.

⁴ *Standard Folding Bed Co. v. Keeler*, 37 Fed. Rep. 693, U. S. Circuit Court, D. Mass., Feb. 20, 1889. Followed on final hearing, Jan. 3, 1890, 41 Fed. Rep. 61.

course of trade in another territory in which another person had an exclusive right.

No reference is made in these cases to the decision of Judge Coxe in *Hobbie v. Smith*,¹ in which the facts were similar to those in *Hobbie v. Jennison*, afterwards decided by Judge Brown,² and finally by the Supreme Court.³ The question was whether the plaintiffs, being assignees of a patent for certain States, could recover damages for the sale of the patented articles in another territory by persons who knew that they were to be used in the territory of the plaintiffs. Upon this proposition, Judge Coxe said, "there may be room for discussion as to what the law should be; there can be none as to what the law is. In *Adams v. Burke*, 17 Wall. 453 (at Circuit, 1 Holmes, 40), the question was sharply at issue, and the Supreme Court decided that a patented article, when rightfully bought, could be used anywhere, thus going a step further than is necessary in the case at bar, for here the action is against the seller, there being no pretence that the defendant ever used the pipe in the forbidden territory."

*Hobbie v. Jennison*⁴ came before Judge Brown (afterwards a justice of the Supreme Court), and he agreed with Judge Coxe that the case was not to be distinguished from *Adams v. Burke*, and said that that case must be accepted as authority for the broad proposition that the sale of a patented article by an assignee within his own territory carries the right to use it everywhere, notwithstanding the knowledge of both parties that a use outside of the territory was intended; but he said: "Were this an original proposition, we should be strongly inclined to hold that the vendor of a patented article who sells the same for the purpose of or knowing that it will be resold or used in the territory belonging to another, is equally amenable to suit as if the sale were made in such other territory." And referring to *Adams v. Burke*, he said: "It may perhaps admit of some doubt, especially in view of the strong dissenting opinion in that case, whether this doctrine will be adhered to should the question ever be reargued, but of course the case is the law unto this court, and must be followed until overruled by the court which pronounced the opinion."

Shortly after this, the Supreme Court decided a case involving

¹ 27 Fed. Rep. 656, U. S. Circuit Court, N. D. New York, May 10, 1885.

² 40 Fed. Rep. 887, E. D. Mich., March 4, 1889.

³ 149 U. S. 355.

⁴ 40 Fed. Rep. 887, U. S. Circuit Court, E. D. Mich., March 4, 1889.

the rights of holders of patents for the same invention in different countries, and not those of assignees of the rights for different territories under the same patent.¹ With regard to the claim of a right to use the patented article in this country after it had been purchased in Germany from the holder of the German patent, the Chief Justice said that the right which Hecht (the patentee) had to make and sell the burners in Germany was allowed to him under the laws of that country, and purchasers from him could not be thereby authorized to sell the articles in the United States in defiance of the rights of patentees under a United States patent. The court referred to the distinction taken in *Wilson v. Rousseau*,² *Bloomer v. McQuewan*,³ and *Adams v. Burke*,⁴ between the right to make and vend and the right to use, the former being a part of the franchise, and the right to use after the sale being unlimited to any locality; but the conclusion with respect to the right to use was not applied to the case of the article purchased under foreign patents. The monopoly given by the patent of one country was regarded as wholly distinct from that given by another, and there was no discussion of the effect of the statute providing for a division of the monopoly under a United States patent.

When *Hobbie v. Jennison* came before the Supreme Court,⁵ it was insisted that the doctrine of *Adams v. Burke* applied only to cases in which the goods were lawfully sold for general use, and not to a case in which the sale was made nominally where it was lawful for the express purpose of having the goods used in a place where the sale would be unlawful; but the court said: "We are of opinion that the case of *Adams v. Burke* cannot be so limited; that the sale was complete at Bay City, and that neither the actual use of the pipes in Connecticut, nor a knowledge on the part of the defendant that they were intended to be used there, can make him liable."

This was a case in which the patented article was bought for use, and not for sale. In the next case, *Keeler v. Standard Folding Bed Co.*,⁶ the question came squarely before the court whether the doctrine that an article once sold in one place was free from the monopoly everywhere would permit a man to buy from an assignee of one territory for the purpose of selling within the territory of another. The right to vend had been distinguished in

¹ *Boesch v. Gräff*, 133 U. S. 697, March 3, 1890.

² 4 How. 646.

³ 14 How. 539, 549.

⁴ 17 Wall. 453.

⁵ 149 U. S. 355.

⁶ 157 U. S. 659, April 5, 1895.

Adams *v.* Burke from the right to use, and had been called a part of the franchise. Did the fact that the article had been sold permit the purchaser to sell it in those parts of the country in which this franchise was in another? The Supreme Court held that it did.

Judge Brown had then become a member of that court, and he read a dissenting opinion, in which the Chief Justice and Field, J., concurred. He conceded that the court was committed by *Hobbie v. Jennison* to hold that a vendee of a patented article has a right to make use of it anywhere, even though it was purchased for the purpose of being used in the territory of another; but he said: "We are now asked to take another step in advance and hold that a rival dealer, with notice of the territorial rights of a licensee or assignee, may purchase any quantity of patented articles of the patentee, and sell them in his own territory, in defiance of the rights of the owner of such territory. To this proposition I am unable to give my assent." The court, however, decided that, upon the doctrine of *Adams v. Burke* and *Hobbie v. Jennison*, "It follows that one who buys patented articles of manufacture from one authorized to sell them becomes possessed of an absolute property in such articles unrestricted in time or place."

The result of these decisions is that the rights of assignees for specified parts of the United States, under assignments which are authorized by the statute, are without protection from the patent laws against the invasion of their territory by the use or sale of the patented articles purchased in other parts of the country, even though the purchase be made for the purpose of use or sale within the territory, and with notice of the rights of the assignees.

Whether such rights may be protected in any other way, the Supreme Court decline to express an opinion, and Mr. Justice Shiras, reading the opinion of the Court in *Keeler v. Standard Folding Bed Co.*, said: "Whether a patentee may protect himself and his assignees by special contracts brought home to the purchasers is not a question before us, and [is one] upon which we express no opinion. It is, however, obvious that such a question would arise as a question of contract, and not as one under the inherent meaning and effect of the patent laws."

It is certainly very important that protection of some kind should be given to the territorial rights which the patent laws allow to be created.

Justice Bradley, in his dissenting opinion in *Adams v. Burke*,¹ speaking of the effect of the decision that, when the article had once been sold, the patent laws afford no protection, says: "Such a doctrine would most seriously affect not only the assignor (as to his residuary right in his patent), but the assignee also. For if it be correct there would be nothing to prevent the patentee himself, after assigning his patent within a valuable city or other locality, from selling the patented machine or article to be used within the assigned district. By this means the assignment could be, and in numberless instances would be, rendered worthless. Millions of dollars have been invested by manufacturers and mechanics in these limited assignments of patents in our manufacturing districts and towns, giving them, as they have supposed, the monopoly of the patented machine or article within the district purchased. The decision of this court in this case will, in my view, utterly destroy the value of a great portion of this property." So also Justice Brown, in his dissenting opinion in *Keeler v. Standard Folding Bed Co.*,² said: "Under this rule a patentee may assign his right to make and sell the patented article in every State in the Union except his own; may there establish a manufactory, and may, by his superior facilities, greater capital, more knowledge of the business, or more extensive acquaintance, undersell his own licensees, drive them out of business, and utterly destroy the value of their licenses."

It is a matter of great practical importance, therefore, for those who deal in patent rights to know whether, upon the assignment of the patent, or the grant of an exclusive license for a certain territory, there is any way in which the patentee and his assignees or licensees may protect themselves against the sale or use within their territories, and, if so, by what means such protection may be secured, and it opens an interesting field for inquiry as to what principles of law or equity are applicable to such a case.

It is obvious that contracts between the patentee and the licensees are not in themselves sufficient to afford all the protection that is required. If each licensee should agree that he would not himself sell the patented article outside of his own territory, and if the patentee should agree that he would not himself sell the article nor authorize it to be sold within that territory, these agreements would be binding between the parties, but they would not in them-

¹ 17 Wall. 453-459.

² 157 U. S. 659-672.

selves be binding upon strangers who might purchase the article, nor would they create any direct obligation between the assignees of the patent for the various territories. The contract between the patentee and the assignee of one territory would not furnish a right of action against the assignee of another, nor would it give the assignee protection against the acts of purchasers who were not parties to the contracts. In order to give adequate protection it is necessary that there should be some obligation that will be binding upon and available to the assignees as between themselves, and will also affect purchasers of the patent rights, or patented articles, or at least such purchasers as bought with notice of the arrangements made with respect to the sale or use of the articles in the various territories.

The question is whether such obligations can be created, and how far they will reach, and in what manner they can be enforced. Suppose, for example, that a patentee has given exclusive licenses to several persons to sell within certain territories, and has taken from each licensee an agreement that he will not sell in the territory of the other. If the patentee himself, or any of his licensees, sell within his own territory to one who is known to be buying for the purpose of selling within the territory of another, and with notice of the agreements, is there any way of preventing the purchaser from selling the goods within the territories of the other licensees? The patent laws, under the decisions of the Supreme Court, afford no protection in such cases. Is there a remedy at law or in equity against the patentee, or the several licensees, or against the purchaser who buys with notice of the agreements?

The remedy of a licensee against the patentee depends of course upon the terms of the contract between them, but to what extent can the several licensees acquire rights as against one another, and as against the acts of purchasers from the others?

The Supreme Court, in *Hobbie v. Jennison*,¹ while deciding that the patent laws afforded no protection in such cases, said: "It is easy for a patentee to protect himself and his assignees where he conveys exclusive rights under the patent for particular territories. He can take care to bind every licensee or assignee, if he gives him the right to sell articles made under the patent, by imposing conditions which will prevent any other assignee or licensee from being interfered with." There were no conditions nor restrictions

¹ 149 U. S. 355.

in that case in the title of the defendant. He was the assignee and owner of the patent for the State of Michigan, and it was held that he was entitled to sell goods with the knowledge and intention that they were to be used in the territory assigned to the plaintiff. The suggestion, therefore, was not necessary to the decision of the case, and cannot be regarded as an authoritative declaration of the opinion of the court. In the next case, — the case referred to at the beginning of this article,¹ — the court seems to take pains to declare that it has not committed itself to the suggestion thrown out by Mr. Justice Blatchford in the former case. The court, speaking by Mr. Justice Shiras, says: "Whether a patentee may protect himself and his assignees by special contracts brought home to the purchasers, is not a question before us, and [is one] upon which we express no opinion."

There is no decision of the Supreme Court, therefore, upon the question whether by means of conditions or of contracts brought home to purchasers the assignees can be protected from being interfered with by one another or by purchasers of the patented article with notice of the contracts.

The suggestion of Mr. Justice Blatchford seems to be that, by means of conditions imposed in granting the licenses, the several licensees may be prevented from interfering with one another in the sale of the patented articles; and the question suggested by Mr. Justice Shiras is whether the patentee may protect himself and his assignees by special contracts brought home to the purchasers. The question is, On what principles can these conditions and these contracts be made binding upon persons who are not parties to them?

If an assignee takes the right to sell in a given territory on condition that he will sell only for use within that territory, will a purchaser who buys with notice of this condition be bound by the restriction? Can he be restrained by a court of equity from making use of the article in such a manner as to violate this condition agreed to by his vendor, or does the purchase of the article give him the right to use it without regard to any contract or condition entered into with respect to it by a previous owner?

An assignee of the patent right may, no doubt, take it subject to restrictions affecting the manner of the use of it. He may be subject to an agreement not to manufacture except for certain

¹ *Keeler v. Standard Folding Bed Co.*, 157 U. S. 659.

persons, not to use except in a certain way, and not to sell except in a certain place, and any assignee from him of this right would take the privileges subject to these conditions. But upon a sale of a patented article, the article itself, according to the doctrine established in the Supreme Court, is freed altogether from the monopoly of the patent laws, and is no longer subject to any restriction imposed by them. If any restriction is to be imposed upon the manner or the place of its use, it must be imposed by contract or other personal obligation; and, with respect to the sale or use of the article itself, the question of restriction will depend upon the question whether a condition or restrictive contract with respect to the use or sale of it may be held to be binding upon any one who purchases it with notice of such condition or contract.

This suggests the question whether the principles of equity that have been applied to lands sold subject to conditions or restrictive covenants are applicable to personal property also. It is well established that, under certain circumstances, one who purchases land with notice of a covenant made with a former owner limiting the manner of its use will be restrained from making use of it in such a manner as to violate this covenant, even though the covenant do not run with the land; and this remedy is given not only to the person with whom the covenant was made, but also in some cases to assignees of other land for the benefit of which the covenant was exacted.

Is there an analogy between the cases in which this doctrine is applied to covenants restricting the use of land, and the cases of agreements restricting the manner of use of patented articles in one territory for the benefit of the rights retained with respect to another territory?

The doctrine has not been applied to personal property in general, and the cases in which the doctrine has been developed and defined relate for the most part to real estate; but it is a suggestive fact that one of the leading cases frequently cited as authority for the doctrine applied to the use of land was a case relating to the use of personal property. It was the decision of Lord Justice Knight Bruce, in *De Mattos v. Gibson*.¹ The owner of a vessel had signed a charter-party for a voyage from Newcastle to Suez, and had afterwards mortgaged the vessel to one who had notice

¹ *De Gex & Jones*, 276.

of the contract. Lord Justice Knight Bruce said: "Reason and justice seem to prescribe that, at least as a general rule, where a man by gift or purchase acquires property from another, with knowledge of a previous contract, lawfully and for a valuable consideration made by him with a third person to use and employ the property for a particular purpose and in a specified manner, the acquirer shall not, to the material damage of the third person, in opposition to his contract and inconsistent with it, use the property in a manner not allowable to the giver or seller. This rule, applicable alike in general, as I conceive, to movable and immovable property, recognized and adopted, as I apprehend, by the English law, may, like other general rules, be liable to exceptions arising from special circumstances, but I see at present no room for any exception in the instance before us." And he issued an injunction restraining the mortgagee, with notice of the charter-party, from interfering with the voyage to Suez.

The contract in this case was not a contract imposing a perpetual restriction upon the mode of the use of an article, and it was not in this respect analogous to a restrictive covenant, nor can the case be considered as authority for the proposition that such a restriction can be put upon the use of personal property. It was a contract made by the owner agreeing to give another the right to use the article for a certain time, and the charter-party may have been regarded as giving an equitable interest in the vessel for the voyage. It was a contract which would be considered in equity as giving the third person a right in the ship which the purchaser with notice would not be permitted to violate. The significance of the decision in the present discussion is, that the court declares, in referring to personal property, the doctrine which has become the basis of the rule adopted in dealing with restrictive covenants with respect to the use of real estate.

The court of equity in restraining the violation of restrictive covenants with respect to the use of land does not enforce any rule of the common law relating to real estate. It does not confine the remedy to cases in which the covenant runs with the land, nor does it base its action altogether upon the idea of an equitable easement, but originally and chiefly upon the ground that the purchaser who has taken the land with notice of a contract made for the benefit of other land of the vendor, or his assigns, shall not be permitted in equity to use it in a manner inconsistent with the contract. The cases on this subject are discussed in an article by

the present writer in the HARVARD LAW REVIEW for January, 1893,¹ with especial reference to the application of the principle to restrictions arising out of the adoption of a general plan for the use and improvement of a tract of land divided and sold to different persons. It was pointed out in that article, that in some of the leading cases the action of the court in granting an injunction was based on purely equitable grounds, and that it was held that the obligation arose out of acquiring the property with notice of the agreements made with respect to it. In *Duke of Bedford v. British Museum*,² one of the earliest cases on the subject, the action of the court was put on that ground. In *Tulk v. Moxhay*, Lord Chancellor Cottenham said: "The question is not whether the covenant runs with the land, but whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into with his vendor, and with notice of which he has purchased." So also in *Whitney v. Union Railway Company*,³ Chief Justice Bigelow, of Massachusetts, said: "An agreement restricting the use of land is binding on an assignee with notice, not because he is an assignee, but because he has taken the estate with notice of a valid agreement concerning it which he cannot equitably refuse to perform"; and Chief Justice Beasley, in a leading case in New Jersey,⁴ said: "The principle on which equity enforces the burden of a covenant against an alienee is that of preventing a party having acquired land with knowledge of the rights of another from defeating such rights, and not upon the idea that such engagements create easements which run with the land."

*Whatman v. Gibson*⁵ was one of the first of the English cases in which relief was granted upon the principle of carrying out a general plan for the improvement of land, and Vice Chancellor Shadwell said that all the parties to the deed were bound by it, and that he saw "no reason why, there being an agreement, all persons who came in with notice should not be bound by it, each proprietor being manifestly interested in preserving the uniformity and respectability of the row."

In a case in New Jersey,⁶ the doctrine of obligation arising out of notice was applied to the use of personal property which a

¹ 6 Harvard Law Review, 280

² 1 M. & K. 522 (1822); 2 Phill. 774 (1848).

³ 11 Gray, 359.

⁴ *Brewer v. Marshall*, 19 N. J. Eq. 537 (1868).

⁵ 9 Sim. 196 (1838).

⁶ *Manhattan Manufacturing & Fertilizing Co. v. Van Keuren*, 23 N. J. Eq. 251.

lessor of land had agreed to give to the lessee to be used in carrying on his business on that land. It was the blood and other refuse of an abattoir, and a subsequent lessee of the abattoir sold this blood and refuse to another, who had notice of the covenant that they were to be given to the complainant. It was held that the lessees of the abattoir were bound by the covenant, and that the purchasers, having notice of it, were bound also, and that they should be restrained from taking or using the products which had been reserved for the complainant.

The principle that one who purchases property, with notice of a valid agreement made concerning it conferring a right upon another, would seem to be applicable to personal property, as well as to real estate, and it was this doctrine no doubt to which Justices Blatchford and Shiras referred when they spoke of notice of the rights of assignees of a territorial right, and of "contracts brought home to the purchasers."

The notice, however, must be notice of some right relating to the thing purchased, or else of some right of the party or of a third person in other property which is connected with the contract of sale. It must be notice of a right acquired in a thing, an equitable right acquired by contract and not conveyance, but still a right in a thing and not a merely personal obligation. The right protected is the right which some person has acquired concerning the thing, and not merely a right which has been acquired or given with respect to the actions of another. It is only with this limitation that it will be held that notice affects the right of a purchaser to deal with the thing purchased, whether it be real estate or personal property.

The doctrine of restrictive covenants with respect to real estate does not go so far as to permit the owner of land to impress upon it any notion he may please, nor does it impose upon the purchaser of land the performance of any contract whatever which the owner may make with another with respect to the use of it.¹ Covenants which are enforced under this doctrine are for the most part negative covenants with respect to the manner of the use of the land,² and they are covenants made upon the sale of the land with the intention that they should affect the use of

¹ *Brewer v. Marshall*, 19 N. J. Eq. 537; *Wilson v. Hart*, L. R. 1 Ch. App. 463.

² *Haywood v. Brunswick &c. Soc.*, L. R. 8 Q. B. D. 403; *London & S. W. Ry. Co. v. Gomm*, L. R. 20 Ch. D. 562.

it in the hands of future assignees.¹ They must be covenants touching the use of the land itself, and not merely the products of it,² nor the conduct of the owner of it, and if they are to be enforced by assignees of the covenantor they must be made for the benefit of other land which he retains, and afterwards conveys, or in pursuance of a general plan relating to the land to which they relate.³ The doctrine, therefore, if it were applied to personal property, would not be unlimited in its scope, nor be applicable except under certain circumstances and conditions.

It is not necessary now to consider the general question whether it would not be inconsistent with the freedom of sale of personal property to permit restrictions to be placed upon the use of it in the hands of purchasers. It is no doubt true that there are many conditions which cannot be imposed by owners of personal property upon the use that is to be made of it hereafter. The question now relates to the effect of a contract made by the owner of a patent right with respect to the use of an article which he has the exclusive right to make, use, and sell. The contract is made as one of the conditions upon which he parts with this exclusive right, and is made for the benefit of the rights under the patent which he retains, and which it may be he afterwards conveys to others. It is a contract made, it may be, in pursuance of a general plan for the distribution of his rights over the whole territory embraced in his patent rights, and for the benefit of all who may purchase from him any parts of those territorial rights. In all these points the conditions are analogous to those under which the law of restrictive covenants with respect to land is applied, and the question is only whether under these circumstances the same principles are applicable to the sale of patented articles for use in certain territories, and whether by means of notice brought home to the purchasers the conditions so imposed may be enforced.

With regard to real estate it is well settled that, if land be sold subject to a restrictive covenant taken for the protection of other

¹ *Keates v. Lyon*, L. R. 4 Ch. App. 218; *Master v. Hansard*, L. R. 4 Ch. D. 718; *Renals v. Cowlishaw*, L. R. 9 Ch. D. 125; L. R. 11 Ch. D. 586; *Nottingham Patent Brick & Tile Co. v. Butler*, L. R. 15 Q. B. D. 264.

² *Brewer v. Marshall*, 19 N. J. Eq. 537.

³ *Spicer v. Martin*, 14 App. Cas. 12; *MacKenzie v. Childers*, L. R. 43 Ch. D. 265; *Parker v. Nightingale*, 6 Allen, 341; *Dana v. Wentworth*, 111 Mass. 291; *De Gray v. Monmouth Beach Club House Co.*, 50 N. J. Eq. 329.

land retained by the grantor, a purchaser of the land sold taking with notice of the covenant may be restrained from using the land in violation of the covenant, and that a suit for such an injunction may be maintained, not only by the original grantor, but also under some circumstances by one who has purchased the land for the benefit of which the covenant was made.¹

So also where land is divided into parcels, and all the parcels are sold with similar restrictions in pursuance of a general plan for the improvement of the whole property, any purchaser that takes with notice of the restrictions will be restrained from using the land in a manner inconsistent with the contract, and a suit for an injunction may be brought against any purchaser of any of the other parcels, whether he be in law an assignee of the contract or not.² And again, if two persons agree together with respect to the restrictions upon the use of adjoining pieces of land, the assignee of either one with notice of the covenant will be prevented at the suit of the assigns of the other from using the land in violation of the agreement.³

So far as this principle is concerned, there would seem to be no distinction between real and personal estate, and the cases relating to real estate are, therefore, to be considered in examining the question of the effect of notice of a restrictive covenant relating to the use of patented articles.

There are analogies in these cases to the cases of the owners of territorial rights in a patent. The analogies are not perfect, but they are suggestive, and there is reason for the application of the same principles to both. A patentee has the exclusive right to make, use, and vend the patented article throughout the whole country. The law gives him authority to assign this exclusive right to different persons for different parts of the United States. Each purchaser then acquires an exclusive right for the territory assigned. In making this division of his territory the patentee, in order to protect the rights which he retains, or those which he may assign to others, exacts of each assignee a covenant that the goods which he may manufacture, use, or sell under the patent shall not be sold or used outside of his own territory. The con-

¹ *Renals v. Cowlishaw*, L. R. 9 Ch. D. 125. "Restrictions upon the Use of Land," 6 Harv. Law Rev. 280-289, and cases cited.

² *Spicer v. Martin*, 14 App. Cas. 12; *Dana v. Wentworth*, 111 Mass. 291; *De Gray v. Monmouth Beach C. H. Co.*, 50 N. J. Eq. 329, 336; 6 Harv. Law Rev. 280 291.

³ *Trustees of Columbia College v. Thatcher*, 87 N. Y. 311.

tract is one of the conditions under which he has acquired any rights at all. He may have bought goods already manufactured under the patent, or the right to make them himself. In either case, the contract with respect to the place in which they shall not be used is a limitation in equity upon his right to sell or use them. He sells them to one who has notice of the rights of others so reserved under the contract. The purchaser has a complete title at law. The goods are free from the restrictions of the patent laws, but he has purchased them with notice of a contract made by the owner of the patent rights for the protection of other rights which he retains, or has conferred upon others, and it would seem that equity should enjoin him from making use of the goods in violation of the contract under which the right to sell them was acquired by his vendor. The contract is in fact a charge upon the franchise conveyed. It is at least an equitable right in another, and brings the case within the rule that a purchaser with notice of a right in another is in equity liable to the same extent and in the same manner as the person from whom he made the purchase.¹

In such a case the right to an injunction would belong not merely to the patentee with whom the contract was made, but also to all the assignees of the franchises for the benefit of which the contract was taken. The contract was not merely a personal one, but it was made in pursuance of a general plan for the division of the property represented by the franchise, and for the protection of that franchise in the hands of the assignees of the several territories. The contract relates not merely to the sale of articles under the patent, but also to the exercise of the franchise itself. In purchasing the right to make and sell in a particular place, the purchaser buys a portion of the franchise which the patent confers. It was so held by the Supreme Court in *Bloomer v. McQuewan*,² where a distinction was made between this and the right to use an article already sold, and in making an assignment of a territory or a license to make and sell within a certain territory the vendor who exacts a contract not to make or sell for use in another territory takes it for the protection of the portion of the franchise which he retains, or which he has sold or is about to sell to others.

One who purchases the article, therefore, with notice of the contract, purchases it with notice of the rights of others which the contract was intended to protect.

¹ *Le Neve v. Le Neve*, 2 White & Tudor's Ldg. Cas. Eq. 32, note.

² 14 How. 539-549.

It may be objected that the effect of this, after all, is to impose restrictions upon the use and sale of articles of merchandise, and that such restrictions are inconsistent with the right of property in chattels, and that it is against public policy to permit personal property to be subject to restraints with respect to the place in which it may be used, and that it may be even an improper restraint upon commerce between the States. We need not now inquire whether the doctrine of notice may be applied to the ordinary sales of personal property, and whether it is possible for an owner to execute a contract with respect to any chattel in the ordinary course of trade which shall be binding upon all who take with notice of it. Questions of public policy would no doubt affect the decision in such a case, but to apply the doctrine to cases of sales of patented articles sold by persons having limited rights under the patent laws is only to give protection to rights which the patent laws have created. Whatever may be thought of the policy of permitting a person to divide up the franchise of a patent, and to assign several franchises for different parts of the United States, that right is expressly given by the patent laws, and it is only because goods once sold are no longer subject to the patent that the right is not protected by the patent law itself. It would seem, therefore, that it is not against public policy to permit the holders of the several franchises to protect the franchise by special contracts with reference to the use of the articles within their territories; but, on the other hand, it seems to be the only way in which effect can be given to the policy implied in that provision of the patent laws which authorizes the patentee to make an assignment for a specified part of the United States.

There are some suggestions in the text-books and in the decided cases that the doctrine of notice of restrictive covenants will be applied to the use and sale of patented articles within specified districts. Justice Blatchford, in *Hobbie v. Jennison*,¹ spoke only of binding each assignee or licensee by imposing conditions which would prevent any other assignee or licensee from being interfered with, and Justice Shiras, in *Keeler v. Standard Folding Bed Co.*,² said, "Whether a patentee may protect himself and his assignees by special contracts brought home to the purchasers is not a question before us, and [is one] upon which we express no opinion." But in a recent English case, *Wederman v. Société Générale*

¹ 149 U. S. 355.

² 155 U. S. 659.

d'Electricité,¹ the doctrine was applied to the purchase of patent rights subject to notice of an agreement with another to pay royalties. It was insisted that there was no privity between the plaintiff and the last assignee, and that the first assignee alone was liable, but this was not sustained. Sir George Jessel, M. R., said: "Now if that is so, if the owners for the time being of the patent are to work it, and are to pay five per cent to the plaintiffs out of the profits, then whether we treat it as a partnership, or whether we treat it as a charge on this patent, or whether we treat it as a royalty, it is quite plain that nobody could take the patent with notice of the arrangement, and say we will keep all the profits and not be liable to account. What *Spencer's Case* (3 Rep. 16*a*), and *Keppell v. Bayley* (2 M. & K. 517), have to do with such a case as this, I cannot see. It is a part of the bargain that the patent shall be worked in a particular way, and the profits disposed of in a particular way, and no one who takes with notice of that bargain can avoid the liability."

This was a case of the purchase of the whole franchise, and not of the franchise for particular districts, and the covenant related to the profits, and not to the use of the article; but the rights acquired on the purchase of a patent were held to be affected by notice of a bargain made with another with respect to the proceeds of the sale of the patented article.

In a later English case, *Heap v. Hartley*,² the question related to the right to exercise the invention and to sell or use the patented article within a specified district for which another had an exclusive license. It was held that a mere licensee who was not an assignee of a patent acquired merely a right to use, and not a title, and could not maintain an action under the patent for an infringement; but *Cotton and Fry, L. JJ.*, before disposing of the case, inquired whether the defendant had not had actual notice of the exclusive license of the plaintiff to use and sell within the district. *Fry, J.*, said: "Then in the second place the plaintiff puts his case in this way. He says, 'The exclusive license implies a contract not to grant to anybody else within the district. The defendants took these machines with notice of that contract, and it would be unconscientious to allow them to use the machines in such a manner as to violate the contract of which they had notice.' Had they then notice of the contract?" It was found that they had

¹ L. R. 19 Ch. D. 246.

² L. R. 42 Ch. D. 461 (1889).

not notice, but it is plain that the question of notice was considered to be pertinent, and the inference is, that, if they had bought the machines with notice of the contract that no one except the plaintiff should be allowed to use them within the district, they would have been restrained from using them there.

In *Dickerson v. Matheson* in the Circuit Court of Appeals for the Second Circuit,¹ a notice of restriction against importation into the United States was held to be binding upon one who purchased patented articles in London from one who held both the German and the United States patents. It was held that the defendant had not succeeded in an attempt by indirection to make the purchase without notice of the restriction, and that the articles remained subject to the United States patent, and that the defendant, using them in the United States, was guilty of infringement. The court said: "A purchaser in a foreign country of an article patented in that country and also in the United States, from the owner of each patent, or from a licensee under each patent, who purchases without restriction upon the extent of his use or power of sale, acquires an unrestricted ownership of the article, and can use it in this country. The cases which have been heretofore decided by the Supreme Court in regard to unrestricted ownership by purchasers in this country of articles patented in this country and sold to such purchasers without limitation or condition, lead up to this principle." This seems to imply that the doctrine that patented articles once sold are free from the monopoly applies only to cases in which they are sold without limitation or condition, and that a sale made with such a restriction would not be held to give an unrestricted right to the purchaser. If the vendor has parted with his legal right, there would at least remain a right enforceable in equity against a purchaser with notice. In the case just referred to, the legal right under the patent was held to be affected by the notice. The purchase being made in England from the owner of the patent in Germany and in the United States, and being made with notice that the goods were not to be used in the United States, it was held that they could not be used there without infringing the United States patent. "It was decided," as Judge Coxe said in the court below,² that "the restriction would follow the goods to this country if the original sale was made

¹ 57 Fed. Rep. 524.

² *Dickerson v. Matheson*, 50 Fed. Rep. 73-77.

subject to the restriction, and it was so made if the goods were paid for at or after notice of the restriction."

There is a distinction between this case of a man holding a patent for two countries, and the case of one who holds patent rights for several districts within the United States; but in the latter case the restriction might well be held to follow the goods into other districts, and to reserve a right in the patentee which could be protected in equity as against purchasers with notice.

In the later case of *Edison Electric Light Co. v. Goelet*,¹ U. S. Circuit Court, S. D. New York, the question of notice was regarded as important on the question whether the vendor of patented articles for one district could be restrained from selling them in the district assigned to another dealer. The court said: "There is no doubt that the defendants were advised in a general way that the complainants claimed the sole right to sell the Edison lamps in the city of New York, but there is no reason for discrediting their statement that as to these particular lamps they had no notice or knowledge of the restriction placed upon them by those who sold them."

In the *Cotton Tie Case*,² patented articles were sold with the condition that they should be used only once, and it was insisted by counsel in the brief for the defendants, that, assuming this restriction to be legally effective between the complainants and the first purchasers, it was not such a restriction as ran with the articles and could operate as to subsequent purchasers. The court, however, did not allude to this argument, but based its decision on the ground that, the ties having been purposely destroyed in the using, the defendants in putting them together were in fact making new ties and were guilty of infringement.

Mr. Walker in the new edition of his book on Patents does not discuss the question, but he seems to take it for granted that notice would have an effect upon the rights of purchasers.³ He says: "An agreement between grantors not to sell or use the patented article in the territory of each other is not binding upon purchasers from either of the grantees unless they buy with notice of the restriction."

¹ 65 Fed. Rep. 615.

² *American Cotton Tie Supply Co. v. Simons*, 106 U. S. ; 14 Brodrex Pat. Cas. 159.

³ Walker on Patents, 3d ed., § 288.

He cites a case in Illinois,¹ where two joint owners of a patent had divided the country between them, and had agreed that each should have the exclusive right to manufacture within his own district, and it was held that this agreement was not binding upon a purchaser from one of the parties of one of the machines made under the patent. The court held that the contract not to manufacture in Illinois did not attach itself to the machines, and run with the property in them as a covenant against their being used in Illinois. It was insisted that the fact that the contract was recorded in the Patent Office as a part of the assignment was notice to the purchaser; but the court decided that the contract related to the manufacture of knit goods by the party, and not to the use of the machines, and the question of notice was not considered.

The authorities are not conclusive on either side of the question, but, under the principles which we have referred to, it would seem to be true that on the sale of territorial rights the patentee may protect himself and his assignees by means of conditions or of contracts brought home to the purchasers. If he takes an agreement from each assignee not to sell or use or sell for use in any territory not assigned to him, or if he makes this a condition of the assignment or the license, then he may not only have his remedies at law and in equity against the assignee or licensee, but he may also have a remedy in equity against one who takes an assignment of the right to sell or use, and also against one who purchases a patented article with notice of the restriction. The rights of a second assignee or licensee of the franchise itself would of course be limited, even at law, by the terms of the original assignment; but the rights also of a purchaser of an article covered by the patent would be affected in equity by notice of the limitation placed upon the rights of the seller, and of an agreement made by him for the protection of the remaining rights of the patentee, or of the rights which he conferred upon others with respect to the sale or use of the articles in certain territories.

The purchase gives the legal right to use the article in every part of the United States, but this would not be available to one who purchased with notice of the fact that the seller had acquired his right to sell subject to a condition or contract that he would not sell for use in the territory granted to another. Whether the contract or condition be regarded as a charge upon the franchise, or

¹ *Pratt v. Marean*, 25 Ill. App. 516 (1888).

as a restrictive covenant with respect to the exercise of the franchise and upon the use of the articles, it would confer rights which a court of equity could protect, and one who had notice of these rights would not be permitted to use his legal title for the purpose of defeating them. Proof of the notice must be distinct. Notice "must be brought home to the purchaser," but if there were definite notice of the contract, and certainly if there were evidence of intentional combination with the person by whom it was made, it may be assumed that the court of equity would give redress.

Edward Quinton Keasbey.

NEWARK, N. J., March, 1896.

PRACTICE OF LAW IN NEW YORK CITY.

THE orator at the Langdell celebration in June last was a foreign lawyer. At once he claimed kin with his distinguished audience by reminding them of the wide sway which our common law holds over this earth, and how that law — despite merely local divergences — is to-day a leading unifying factor in the civilization of mankind. Certainly it is not amiss that a learned profession, at one time distinctively recognized as The Faculty, should thus contemplate its history and also its ultimate goal; and that every earnest, trained member of it should at the close of each day's work, however humdrum, resort to the consolation that even he may to some degree be helping our law to become in form a perfect logic and in substance truth.

It is necessary that a university should teach law thus, as a science, but the students who learn of it only in this academic mode may go to the bar over-persuaded that this sublimation has been definitely reached. It has not.

In New York City law schools are now the highway to the bar. Mere empirics, who used to come into — indeed constitute — the profession by "reading" in the office of some practitioner, are rarely found.

There are at the bar, and probably always will be, men of native aptitude, who, beginning as office boys or as stenographers with large law firms, absorb an inarticulate knowledge of law and of the rules for applying it, and so come into marked success. Such men are not numerous, and certainly are not to be blamed if they be more credit to themselves than to the profession.

The diffusion of wealth enables more men than ever to seek their professional degrees at highly endowed institutions, which can well afford to award diplomas only to such as meet a high standard of knowledge — largely self-won — by the scientific (historical) method.

The interest of those already in the profession is to keep down the number of fresh competitors by keeping up the standard of admission to practice. For twenty years our local bench has narrowly watched the law schools, and the tendency of authority here has been steadily to force a higher standard on those schools

where students are still mechanically prepared to become lawyers. So that our local bar tends to abound in members whose specific training fits them to be philosophic lawyers.

The schools which now teach law as it ought to be may hasten the day when only such law will be recognized and applied. Seven of the nine judges on the Supreme Bench of the United States are school-bred lawyers, three of the seven being from one school. It cannot be but that to some degree their early education may through their decisions color the law of the land.

In his oration, Sir Frederick Pollock expressed surprise, but pleasure, to be able to say that this REVIEW is a contribution of some consequence to the literature of academic law. But for all that, it may not be amiss for the younger readers to find the uniform erudition of these columns now giving way to an exhibition approximately fair and orderly, — of some of the existing circumstances which in New York City at least, seem to set the ideal of the profession hopelessly far off and to make anything like high purpose common to the local bar seem a mere pretence. The excuse for this exhibition is not merely that such existing circumstances seldom cheer the philosophic lawyer at any stage of his career, but that, on the whole, they bear most severely upon beginners at the law.

A surprisingly large fraction of the entire population of the United States dwells within a radius of twenty-five miles from our City Hall, and nearly every human being in that circle is directly or indirectly supported by rents or profits earned on Manhattan Island. Local commissions from boards of trade and legislatures in sister states have for years been vainly devising means that this or that port on our eastern coast might rival or surpass New York. But her natural advantages have not been argued away. As the chief gateway of commerce to a country vast, new, and rich, her commercial importance, her rapid growth in numbers and in wealth, great as they are, have really just begun.

Belief in this prevails. Led by it, men of every calling and variety of merit or purpose sacrifice easy provincial careers and throng here from all parts of the country. No domestic business enterprise, speculative or conservative, avoids our local markets or moneyed institutions. Every form of chartered combination, no matter what state authorizes it, by which individuals seek — just now with success — to absorb the power and profit in an

entire branch of trade, without competition and with the minimum of responsibility, chooses New York City as its real field of operations. Private wealth has become so common that a man worth only a million is mediocre, and a comparison of any one of our richest citizens with Croesus would be odious. Our local law business — not necessarily litigated — keeps pace with this concentrated wealth and commerce. The law enacted by our legislature and declared by our courts to meet our local exigencies is so much and so varied that New York is among the greatest law states in the Union, if not the greatest.

Not reckoning the Federal, Surrogates, and criminal courts, our twenty-five (at times twenty-seven) judges of civil courts of record in New York City began business in October, 1895, with calendars aggregating nearly twenty thousand issues, at law and in equity, awaiting trial under the ministrations of a bar so crowded that we have one lawyer for somewhat less than every three hundred of the population. Besides this, there are all the cases on first appeal to the General Terms, and the vast business of *ex parte* and contested motions.

On an average this would give each member of our bar less than four pending litigations. As a matter of fact, some lawyers in lucrative practice pass long periods of time when they have no litigations at all. On the other hand, the calendars reveal some lawyers having a large proportion of the cases, who are in no wise conspicuous in the profession.

The bar generally could not be supported out of the litigated business. Its steady support comes from office or non-litigated work, and this is true in the long run even of those firms that practise heavily in the courts. This — but not this alone — should chill the untried youth who comes to us with a constitutional yearning for immediate forensic triumphs.

The crowd in the profession signifies more than mere members; nowadays this crowd has a higher average of training, ability, and purpose than ever before. Moreover, it counts many men who have all these qualities and independent means to boot; and who can cheerily bide the period when, as is jocosely said, they have no business, being young lawyers. All kinds of occupation here, professional or commercial, are so filled that a man mistakenly fitted for a given career finds little to hope for in change. But what activity shall he resort to, to keep off rust or melancholy?

The young lawyer of literary ability who in his days of light practice appears too conspicuously as a writer lessens his chances professionally. The financial returns from writing a law treatise, even one that is well received, are surprisingly small. The likelier result of such a book is that it may win the author a good salary with some prominent firm, or, if his youth is not too glaring, will bring him fees as counsel or brief-maker in his specialty.

The rural districts send some better-class lawyers to our legislature; but this city quite invariably uses for that purpose only the poorer stuff at our bar. At times — about once in a quarter of a century — there is an uprising of decent citizens against our corrupt municipal rule. Then young attorneys shine forth as reformers. But for them the success of Reform does little else than set their altruism in a strong light. The present Reform Mayor, in June last, found more than three hundred and fifty of them anxious to sit in the fourteen judicial places then at his disposal. Thus it appears that the competition of beginners *inter se* in the profession and in its collateral activities is now very strong. But though this is the mildest factor in the entire competition that exists here, the younger generation are undaunted. As Mr. Joseph H. Choate expressed it at the Langdell celebration, Mr. Carter will soon retire, and a thousand young men are coming to take his place.

Thus almost ideal opportunity will be offered to the merciless law of the survival of the fittest. New comers may take heart on learning that the best of our lawyers have come through hard — in some cases very hard — beginnings; that the best of our lawyers are and consistently have been lawyers simply, and attend to collateral matters of public concern merely as duties incident to their professional success; that merely by surviving, by continuing on hand at one's office, — not necessarily in mere idleness, — there is always a chance that business will begin; that business well done breeds business; and the strange fact that this city not only allures but she consumes. Old New Yorkers are a trivial minority of the population. Everybody of present consequence here, including the leaders at our bar, came from somewhere else. There are no hereditary or family law firms. The son of a distinguished dead or retired father may be brevetted into the firm merely for the name's sake. Very probably ninety per cent of the rank and file of the bar are immigrants to this city; and the concentration at this point is so strong that we regard even Brooklyn as provincial.

Many lawyers come to this city because they aspire to be simply

lawyers, whereas in the country districts they must be politicians to succeed as lawyers. Provincial lawyers, even if of distinguished success elsewhere, seem usually to feel a strange necessity to explain why they are not found at the metropolitan bar; yet the out-of-town feeling as to the city bar is so sensitive that a lawyer from this city, no matter how able or prominent, must exercise caution in caring personally for his client's rights before a rural jury. On the other hand, our metropolitan juries neither know nor care where lawyers hail from, and there are now at our bar several men who, after some years of uneventful provincial practice, were transplanted here to almost immediate distinguished success.

Immemorial lay prejudice against our profession must still be faced in New York City. Probably if Jack Cade were to appear here with his unholy purpose of killing off all the lawyers, his following would not be small, and would include some really successful litigants. People who know nothing, who know little, and who know much, meet on common ground in having their fling at our profession. The burden of this always is that any lawyer will maintain that black is white, or do much worse, for a fee. The laity forget that the lawyer is the client's reflection, his *alter ego*, and that our system of trial, however imperfect, is still the most perfect way known among men of determining a question of fact. The system would work perfectly if those who apply were perfect. Attorney and client are the terms of a relation. Human beings in all their variety of moral significance, when in need of a lawyer, match themselves up with lawyers of corresponding moral worth. Thus in this crowded centre the bar must be most heterogeneous in order to supply the demand of this morally much diversified litigating public, and a lawyer who has practised long enough to have his character known will finally have a clientage on the whole suiting that character. A layman may not know, and very rarely does know, a lawyer's merit *qua* lawyer, but the character or reputation of his legal adviser he may fairly estimate. Experience justifies the belief that, with few lamentable exceptions, where there is any difference in moral status between lawyer and client, the former is the better of the two. As a rule, the recording angel will do well to keep both eyes on each, and to prepare to weep in case the lawyer ever receives his client's money save under stress of necessity, or holds it from the client one minute longer than he must. He should not allow the client to order this otherwise.

The writer has known of instances in which clients have pro-

posed to young lawyers in this city elaborate schemes of knavery, without previous reason for the clients to believe that the lawyers would approve of such knavery. In one or two instances the young lawyer temporized in order to call in some brother lawyer that the scheme might be detailed before witnesses merely as an incredible curiosity. Probably there is not at the bar to-day an experienced member of honorable standing who has not had at the bidding of the laity a high-priced chance to depart secretly from his record.

Fate decrees that trouble and legal problems in a particular piece of law business are great just as the amount involved in that business is small. But despite this, the entire bulk of petty work being done for charity at any given time by our bar in this city would probably exceed the whole law business of many a county town. A few years ago a member of our bar found in his safe a bundle done up in an old red handkerchief. It had been left there by a person then several years dead, known to be eccentric, and believed to be needy. This lawyer discovered that it contained, in such form that he might have appropriated it and none been the wiser, a considerable fortune. He promptly hunted up the kin of the deceased owner, and handed this find over to them. His chosen calling had not contaminated him.

It is one of the hardships of practice here, that the bar is so extensive that no lawyer can be acquainted, even by reputation, with all of it, and on undertaking any new piece of business he must be prepared to meet the best or the worst the bar affords. If he meets a hundred new lawyers each year, he must have a practice of many years and great variety to meet the whole bar. If he encounters an example of the worst, he must not only attend to the merits of his client's case, but exercise other wisdom born only of experience, and not to be had at a law school.

That a lawyer's conduct should meet a high standard, everybody admits as an abstract proposition. The General Term of the Supreme Court and the Bar Association are nominally ready to maintain this. As a matter of fact, whoever tries to start this machinery to work to realize this principle in a given case has his labor for his pains.

The average character of our bar is high, perhaps was never more so; but the history of our bar from the days of the Tweed régime shows that it is quite impossible to say just what a man may not do and still practise in our courts.

Distinguished members of our bar have told the writer of cases in which there was proof positive for disbarment, but that the authorities, on having that proof set before them, continued passive. There are inquiries into professional behavior instituted by the court of its own motion, where justice halts because the aggrieved party cannot pay to take up the referee's report. As a rule, a proceeding to disbar is an incident to a hot litigation. The courts always strive to have the lawyers simply fight out their cases, and to keep them from fighting each other. Every disbarment would defeat this purpose; and, besides, our innumerable statutory penalties cover nearly every act that would justify striking a name from the roll of attorneys.

The bar is generous. An attorney who has made a single misstep may by his good conduct ward off even any reference to it. The Nemesis of hard professional misconduct, no matter of how brilliant parts the offender be, is simply malodorous repute. Knowledge of this spreads through bench, bar, and laity until all of his doings and sayings are taken as *prima facie* spurious.

On general principles, even our elective judiciary stands by the bar. Our local reports tell of a citizen of wealth who by his holographic will proclaimed his dislike of lawyers, and named a private tribunal by which disputes as to the construction and interpretation of his will might be settled. The Appellate Court declared this null, and excusably said that the testator, led by his marked dislike of the profession, carefully framed a will to defeat his own intent. A sweeping judgment on lawyers as a class will not do. Reason usually allows correct judgments only on this one or that one according to his own deserts. The real leaders of our bar are few. They form a coterie, and enjoy special privileges in open court. They are not necessarily to be found in our "big offices." The real strength of each man's grip on his position is his integrity and other people's faith in it; then come his learning and technical skill, and his fair, high-minded use of them. There are no men in the community whose conduct is more steadily tested by high exactions. As moral factors hereabouts, they are unexcelled by any men of any calling, and the position of each such leader is more honorable and more to be envied than any place on our bench, as at present constituted.

The line between civil and criminal practice is rigidly fixed. The vast majority of the profession knows little or nothing about the Criminal Codes, and not infrequently one meets a well informed

lawyer who knows only vaguely where the criminal courts are held. There are of course a very few notable exceptions to this. But, as a rule, a leading lawyer in civil practice as little thinks of defending a criminal as he thinks of filling the pulpit on Sunday in one of our large churches. Several men of high rank at the bar as trial lawyers have lately gone into the criminal courts on emergencies. In one instance the experimenter, as soon as his task was done, fell seriously ill. In others the distinguished novices admitted having been nervous and sleepless, and professed a distaste, if not an incapacity, for that branch of law. Bad as all of our court-rooms usually are, the criminal courts till just now have been so much worse that a strong stomach seemed a *sine qua non* for practising in them.

The entire bar now depends on the great libraries in the city for research. No law office pretends to have all the books it may need. The older lawyers have libraries too extensive to discard, and not full enough to be a sole dependence. The younger lawyers supply themselves simply with a few books on local practice, and digests of local reports.

Many local lawyers persist in the fallacy that law is not a business; that the profession must not become commercialized. Some such even refuse to have bill-heads, lest the law might thus be assimilated to mere ship-chandlery. Obviously there are other and better means than this of substantiating the dignity of the profession, and until these lawyers dispense with bills as well as bill-heads their humbug will be too plain to be harmful.

The philosophic lawyer haunts the studious cloister, and is intrinsically not a money-getter. In the long run, even in New York City, he is indispensable to the correct practice of the law, even by a money-getting firm. To every member of our local bar the might of the dollar is steadily, often painfully, present. Adam Smith declared that, "if lawyers were not paid, they would do even worse work than they do now." But as he reasoned *a priori*, the profession need not take his slur too much to heart, but may depend on the frank authority of one schooled by local experience. Such a member of our local bar, who had served professionally, but only incidentally, in procuring the franchise for running cars on Broadway, and who has also filled a judgeship in an important local court, declared under oath before our Senate Investigating Committee that it is impossible to practise law here "on wind." The discrimination of the witness between what is and what is not wind was justified by a charge of fifty thousand dollars.

The young man who to-day enters our profession hereabouts simply on his merits, to win its rewards beginning with a bare living for himself, must face competition at least as pitiless as any similarly equipped youth may find on starting into any trade or business on Manhattan Island. In fact, nothing in the "help advertisements" of our local newspapers for any kind of trained high-grade service quite parallels the offers of cheap work constantly made in our Law Journal by members of the bar bred at college and law school.

Members of our bar who have recently published books have informed the writer that there is no difficulty whatever in procuring men of well trained intellect to do the drudgery incident to such publications very cheaply, and that while the sober, steadfast, and demure of these stand by such work for beggarly pay, others of cheaper faculty and schooling make a break for independent business, and in some way get ahead.

The chasm between the tyro and the successful lawyer is enormous; it is made so, not so much by the legitimate differences of age, experience, learning, and ability, as by the older man's material accidents, largely capable of being expressed in dollars, — that is, well equipped and extensive offices at an annual rental of two to four dollars per square foot of floor surface, membership in prominent expensive clubs with long waiting lists, and similar advantages.

This showing persuades persons of a certain not rare quality of mind that to succeed at the bar it is needful to be spectacular. Young men of this species hire offices beyond their means, talk loudly in elevators and public places of representing influential clients and vast interests wholly imaginary; they announce their lack of time to take lunch, and if their antecedents are not too easily traceable such young men come before this community with engraved announcements that they are about "to resume" practice at the metropolitan bar. It may be that law makes one fussy, for Chaucer says his man of law was the busiest of men, and yet "seemed busier than he was."

Older men of this stripe make the local competition more factitious than ever, not only by grasping business and having obtained it by working out of it a fee from every point of view, but by utterly absorbing all the credit for work and professional skill, though such credit belongs to others kept in the shade. The writer has heard a man of this sort, a highly successful money-

making member of our bar, say that long ago he discovered that the more law he read, the less he knew; that it was merely business which a successful lawyer needs here; that the best of law is to be had cheap; and that the chances are that if Lord Mansfield were a young member of our bar to-day, he (the money-maker) would have him in his office at fifteen hundred dollars a year.

Clients select legal advisers, as lawyers select dentists, — largely on faith. To this, of course, there are exceptions, especially in the case of great corporations. The latter often select a lawyer with great nicety as to his merits as a lawyer. A corporation may have a lawyer selected with this nice discrimination in each locality where the corporate work is done, and, more than that, it often selects a lawyer with reference to his peculiar fitness for the special piece of work.

All clients, however, do appreciate that lawyers are legion, and that they work for pay. The day is at hand here when clients run from office to office to get their legal services done by the lowest bidder, and in this they are aided and abetted by many of the profession. This is particularly true in regard to actions for tort, proceedings to vacate assessments, and as to searching titles. In regard to torts, arrangements amounting to champerty and barratry are not uncommon, and in regard to searching titles such arrangements are made occasionally as have resulted in the lawyer having finally either to break his contract or to serve without pay and expend more for disbursements than the entire sum "to cover all" for which he had agreed to examine the title. Recently the writer discovered two men named executors in the will of a person just deceased, running from lawyer to lawyer to get the lowest bid for the entire legal service in settling the estate. The cause for their peculiar zeal was probably that they were the residuary legatees.

None of the law partnerships hereabouts savor of mutual insurance between the members, or are in any wise sentimental, albeit single members of such a firm may now and then write or speak in public as communists or socialists. The dividends or share of profits fit each member's personal value as rigorously as if the subject matter of the business were beef or wool. Many of the large law firms employ cashiers as in a mercantile house, and often a member of the firm is such distinctly as its bagman, its drummer-in of business.

There is no common mould for these men; law schools do not fit

them for their special activity. This one is prominent in politics, that one in the church, another gives club dinners to representative business men, all are kindly to reporters, all laboriously angle for fees; and it is not unheard of that clients employ such men's firms for the bold purpose of getting into relation with or near to a notability. In fact it is finally true that this bagman, however petty as a lawyer, is the distinctive mark of his firm, however excellent as lawyers his partners may be. Many law firms serve corporations or large commercial houses for a yearly stipend. If it be a firm in "mercantile practice" and a jobber or retail merchant comes to it to be put through insolvency, this firm may learn by telephone what, if anything, the bankrupt owes to the wholesale client, and may see that in some mode the wholesalers' debt is preferred; and thus the large commercial houses find it profitable to have such mercantile law firms under steady pay.

It is known that the law business of a corporation is procured and held by marked courtesies to the directors. That the counsel to a corporation should, during his retainer, support a poor relation of a director, is an actual instance of such courtesy, perhaps an extreme one. Manufacturers, fiercely competing for the heavy profits in some dress fabric for which a passing fashion may create an enormous demand, easily find allies at the bar to bring innumerable suits for infringement and injunction. It is never intended to try these suits. They are brought for advertisement, and to fluster small buyers. There are lawyers in this city who keep up steady relations with the reporters. When such a lawyer seeks foreign capital to vitalize a struggling mining corporation in Pennsylvania, the reporters loyally give out that he represents in Europe the vast interests of the Pennsylvania Coal Company. There are numerous others who fight their way to a steady incidental income out of costs from the endless motions with which they ingeniously harass an opponent as long as a litigation lasts. A brother lawyer told the writer of deliberately fighting his way thus into one hundred dollars a month steadily.

Recently, the writer received a luxuriously printed pamphlet, describing a banquet by a law firm, given freely, including wine and speeches, to numerous men of substance and influence likely or desirable to be attracted to a pending business adventure. Among the pointed sparkling responses was one by a member of this firm known to be an exemplar of what is called the "new and progressive methods and ideas." He proclaims that the distinc-

tion between the lawyer and the business man has vanished; that the lawyer is no longer the ill fed chap with a green bag snivelling for a fee, and constantly ridiculed in the older comedies; but that he is to-day the indispensable guide to the business man, and should constantly be in his client's counting-room or ready by telephone. This view of the relation enables the lawyer to say to his wealthy client, "Your trust in me is fully justified. Don't draw a long will showing your intentions in detail, but leave your accumulated treasure to me absolutely as residuary legatee; I will distribute your fortune after your death as you may secretly instruct me, or as you would if living have given it under my advice." In this view, too, the lawyer is transformed into the promoter and broker, and goes abroad as the agent of trusts. In fact, the largest item in some of the great charges made by lawyers in this city within the last ten years has been simply brokerage. Some lawyers abroad for foreign capital at the time the house of the Barings was shaken have been stranded there ever since, showing that the "new method" is not necessarily progressive.

Corporations furnish bonds and security needed in all manner of legal proceedings; they have long stood ready to be executors, trustees, and guardians, and are more and more made use of for those purposes; they have, as shown later in this article, about absorbed title-searching, and a few months ago the birth of a local corporation was announced to give legal advice by written opinions in answer to written inquiries, for two dollars and fifty cents apiece, postage included. This is an approximation to practising law "on wind" and the writer regrets he cannot report the result so far. Thirty years ago, the late John K. Potter alleged that to be a corporation was negligence *per se*. There has been a great reaction, and it is now negligence *per se* to attempt anything except under corporate guise. We may expect even to hear of corporations formed to furnish testimony, — if not indeed to testify on trial.

These existing circumstances, — and there are others, — lead to the conclusion that lawyers in New York seek a dollar for what it is worth, and that the law is a business by which it is growing harder to get dollars.

There are startling instances of financial success at the bar not really attributable to professional skill or service, though when this success appears law business multiplies. For instance, a quiet inconspicuous conveyancer may suddenly move into large costly offices with a horde of clerks, and have a bustling office

business, and also suits of the equity calendar involving all varieties of conflicting interests of holders of liens on real estate. Inquiry may disclose that he himself had or controlled some wealth, and came to his height by a shrewdly made "corner" in a certain quality of bricks which builders at the opening of their working season had to buy of him on his terms. This example is typical, and others could be given.

Within the last twenty years the local bar has endured a great loss of income in the matter of searching titles to real estate. Corporations formed for the business seem about to absorb it utterly. Twenty years more will tell the tale. The law of real estate, indigenous to our system, — English law *par excellence*, — is the special pride of the profession. Owing however to a series of crude, unsystematized statutes since early in this century, providing for a great variety of liens on file in a great number of places, no part of the law is so unpopular.

A conveyancer frequently meets with an abstract showing by the frequent changes of title in the last twenty-five years that at the ordinary lawyer's charge for each change (not counting price of official searches) the bar has received fees aggregating the present market price of the real estate involved. And even at that, the examination of a title in this city is at best only an approximation to correctness. No one is incapable of error, and mistakes are brought home to the best conveyancers, including the title companies. For instance, that a man in the line of grantors, recited as and on inquiry appearing to be a single man, should have after all by some form of marriage a wife who comes along inopportunately to claim her dower, is only one of the nightmares of the real estate lawyer. Yet our last legislature enacted that a wife should be *heir* to a share in her deceased husband's real estate. This spread such consternation in the profession that the law was repealed by the same session that enacted it.

In the leading law offices in this city one used to see posted a schedule of rates for examining titles, as fixed by the leading firms. These rates were then paid; but after the panic of 1873 this schedule was departed from, till now competition is so sharp that titles are sometimes examined at a loss to the conveyancer.

In New York City searches must yet be made in seven different public offices against every owner past and present of the land under examination for about two score sorts of liens. Lawyers used to have to delay their business, and to bide the pleasure of

the County Clerk and Register, for their very important official returns, or else pay extra for what were called accelerated searches. This disposition for extras on the slightest pretext, and even for direct tips, prevails throughout the County Court House and Register's Office. It abates somewhat when reform is in the air, but it is humored continually by the big law firms, who by virtue of it, as against the smaller firms or beginners, are a privileged class. The public records in the Register's Office are inestimably precious. The building and the conduct of the office, speaking calmly, have for years been disgraceful. The building has, as we hear, served formerly as a church and as a prison. It is an antiquated barrack, without proper light or ventilation anywhere, while in some of the murky ground-floor rooms the unsanitary plight suggests typhoid. The light and air grow worse, but the Health Department has lately somewhat suppressed the odors. The libers show various stages of dilapidation, and every species of handwriting. Bad inks have been used, and sometimes have wellnigh faded out. It has more than once been the privilege of the writer, on opening a liber, to see a beautiful specimen of the *cimex lectularius* transgress all the covenants in a full warranty deed, trespass upon the description of valuable real estate, and retire with an air of seisin and further assurance within the binding.

Theoretically, deeds and mortgages are recorded at once. In fact, the work always is months behind, and one seeking to inspect a recent deed will be told it is in Mickey Dooley's bundle on the top floor. When he approaches one of the numerous scriveners on this top floor it may prove to be Moses Polenski, who will tell him Mickey has just gone out and left his papers with O'Flaherty over there. The latter gentleman will, when spoken to, adjust his quid, and then say, "Dem dere is Mickey's papers. Yer kin find what yers want, and be sure to stick it back jist where yers gits it." A sensitive nature must not be shocked if, in addition to the above, this motley crew of copyists breaks forth in cat-calls and clumsily veiled personalities. But since this office has been visited by the Reform administration, the behavior of the scriveners has improved. In near-by Newark the deeds are well recorded by courteous, well-dressed women, who work silently in a secluded room, sunny, carpeted, and clean.

The legislature has required the block system of indexing in the Register's Office. If this is a step towards simplifying real estate records, it is the step that costs, for in four years it has

resulted in four thousand five hundred and fifty-four mistakes. Against this political and pot-house stewardship of our real estate records the title guaranty companies have risen up inch by inch; they have fought in the courts against the office-holders, actually beginning with a fight for the mere right to inspect the public records. Finally, at least two such companies have centralized a plant where in a few hours' time, and upon the most elementary suggestion of what is wanted, either company will furnish as to any particular piece of real estate information that must be sought in seven scattered public offices. Competition has made the work of these companies cheap and speedy to a degree that till lately would have seemed incredible. These companies moreover insure titles (better than a lawyer's certificate) and command capital to lend on mortgage. Although one company is distinctively known as the lawyers', yet the impression prevails that all of them tend to become mere business enterprises, excluding lawyers as a whole except as customers. The insurance companies here having "law departments," and the large firms having an extensive clientage of trustees, have accumulated a more or less imperfect real estate title plant, and their business in this kind will persist. But it seems no longer possible, as it was once, for a beginner to build up a title business, — at its full and best the most paying branch of the law.

The building in which the civil courts are held and their records kept is as unfit for their purpose as the Register's Office is for its use, and makes against the decent administration of justice. The recent death of a judge was attributed to the foul plight of the City Hall, and on account of that plight a fellow judge adjourned his court. The County Court House is chiefly famous as a monument of knavery. Why, it is asked, must we come with clean hands into a building, where Equity instinctively holds her nose? As a depository of records it was long ago insufficient, and is rapidly growing worse. The writer now has a real estate transaction indefinitely delayed because an indispensable record (so recent as February, 1890) cannot be found in our County Clerk's Office.

Present comment on local litigated business must be mostly historical, as the change which went into effect at the opening of this year removed an old state of things, and is now calling forth criticism, but has not yet told its own virtue. Three distinct courts, each with its own machinery complete, have been merged into one court, — the Supreme, with the supervision and patronage of all the parts for initial trial vested in an intermediate appel-

late division. The first result of this was feeling — unjudicially ruffled — on account of disregarded prestige and loss of patronage. But a political boss may not find it easy now to keep here during the summer vacation any judge he may wish for the contingencies of a party fight in a political campaign.

It would be unreasonable to hope that the present new order will wholly obviate our local shortcomings in getting justice by trial. As in the days of Magna Charta, we are still experimenting for justice cheap and speedy. Each issue ready for trial must, according to the court it was lodged in, wait from one to two years before it is first called. The first call of some cases has been postponed by the new combined calendar. If the courts sat, as they ought, more hours in the day and more days in the year than at present, at least until arrears of business are despatched, the enormous expense of our judicial system would be less vain. When after the long delay a case is finally reached, it is tried under pressure for time. The writer has heard an honored judge at circuit tell distinguished counsel attempting to argue questions of evidence, "Gentlemen, it is near the end of the term; next Monday I begin to try cases elsewhere; I must rule at once, and this matter may be argued on appeal." Thus the cost of many of our local lawsuits would have been simply prohibitory to litigants in the days of King John. Some of the existing circumstances that make the outcome of a trial (especially by jury) in this city problematical are the expenses; the delay in being reached; the rush at the trial when reached; the multitude of judges; the vastness not only of the bar, but of this centre of population, whereby inscrutable relations and suppressed influences, by no means always designed, of attorneys, parties, witnesses, and jurors *inter se* may, however irrelevant, actually decide the case; and last, but not least, the Code of Civil Procedure.

Since 1848 we have had an attempt by our legislature to fix our civil practice by three thousand eight hundred and seventy paragraphs of statute all told, which for some years back have been amended on the average of eighty-five paragraphs a year. The cases in which the merits have been suspended that a question as to new practice — the meaning of some part of this Code — might be fought out before the courts at great delay and expense of the litigants, are myriad, and, though the reports of them fill many volumes, the pitfalls are not yet all known. The writer has known of an amendment to result from a letter

by a young lawyer of meagre experience to a friend in the legislature. The thousands of annotations to this Code can be safely used only by finding the exact wording of the section passed upon at the date of the case. But however often a section may be amended, all cases on it in its various stages follow it while it lasts. It is scarcely too much to say that an expert in our practice cannot be sure of knowing it over night. Older lawyers tired of this long ago. In cases where there are a multitude of counsel, it is not unusual, when a question under the code comes up, for the seniors to say, "Let the young men fight that out."

The writer has recently known of a litigation hotly contested to judgment, in which both the attorneys and judge knew nothing of a new section of the Code controlling the chief point in the case. Revision of all its Code is again imminent, but scientific codification is not in sight.

The multitude of judges before whom a case in its many phases may have to pass is a risk of litigation. To a degree, it is like handing around a kaleidoscope, and expecting each person to see the same figure in it. On the recent call of an equity case, the defence claimed that the wrong tribunal had been chosen, and demanded a jury. The judge held that the case was properly before him. As the term was far spent, the case went into the next term, and before a new judge. The motion was renewed, and this judge said there was an issue for a jury. It was cheaper to obey than to appeal, so the issue was proceeded with before a jury. Here the third judge on his own motion declared the matter wholly of equity jurisdiction, and sent it back to equity, where it was tried. All three of these judges have been on the bench for ten or more years. Many judges exchange courtesies to the detriment of litigants. There is now in our highest court an appeal involving under four hundred dollars on a question in which five judges have concurred; but the judge who wrote the last prevailing opinion allowed an appeal through courtesy to one judge, who dissented, but wrote no opinion.

Again, pettifoggers can profit by the number of judges. In vacation (June to October) Chambers is held by the same judge only a week or two at a time. A corporation is sued for refusing to transfer stock on its books. X. is counsel for the corporation, is the treasurer who refused to make the transfer, and also claims to be the legal owner of the stock in question. As counsel he advises himself as treasurer that the corporation has a good

defence on the merits, and swears to the necessary papers for an examination of the plaintiff to enable the corporation to plead, and to stay all other proceedings meanwhile. The plaintiff is a merchant on Union Square, and he is dragged down town once every ten days all summer, each time to face a new judge, till in September, the judge having an early engagement to go to Coney Island, summarily ends the farce. The pleading is never served, but the defendant promptly settles. Owing to the variety of mind on the bench, cases are nursed by counsel so as to avoid certain judges and to come before others. Nobody expects one kind of law from all the judges.

Calendar practice is a nuisance almost unmitigated. The issue when framed lies by from one to two years to be reached, and when first called it is usual to let it go over for two weeks. Setting down a case on the day calendar usually starts a period of fret, — the judges pulling the lawyers one way, the clients and witnesses clamorous to go to their affairs in the other. The writer has answered "ready" on a case at first once, and later twice, every court day from the beginning till the twenty-second of a month, and then the judge suddenly announced that he would take up no case to be two days in trial. This sent the case over to the next term, when it appeared at the end of a long calendar, but owing to a "break" was immediately tried. Lawyers cannot expect fair compensation for this ineffective fret. It makes litigation odious to the parties, and most witnesses unwilling.

To each of the twenty-two justices of the Supreme Court in this city, his judgeship came as an elevation in almost every sense, and that elevation proceeds as his services go on. Since the days of Tweed, local bosses and politicians have had some degree of awe for the bench, and even though they set upon it men degraded by heavy political assessment, they have still been men with the beginning of capacity. It is a public detriment for a judge to learn *all* of his law in the course of his office, but in this city the business is so enormous, so varied, and so quick, that a fresh judge must learn speedily or be swamped. If a justice on Supreme Court Chambers does well all that he seems to be doing when the rush before him is at its worst, Julius Cæsar might well ask to be retired as an exemplar of the power of effective divided attention. As a rule, the new judges develop rapidly to the good, and at their best belong to the public. The tradition grows that good service on the bench binds all parties to the re-election of a

good judge. The judges form a coterie, and generally all hold themselves aloof from public functions save in discharge of their office.

The subject matter of a legal contest rarely justifies all the words that are uttered about it. Stenography and type-writing are not allies of brevity. The written opinions of our judges are too many and too long. A justice in our Supreme Court was summarily deciding a contested question of practice, when the losing lawyer said, "But, your Honor, I have a decision the other way." "Of course you have," said the judge. "Anybody can find in the State conflicting decisions on a question of practice." Except at a jury trial, the lawyers are allowed to talk too much. If our judges would resent carefully and promptly the deliberate misstatements constantly made by lawyers on arguments, they would even by that do much to elevate the tone of the bar, to ease practice, and to save time.

The judges dispense patronage in the appointment of receivers and referees, at the rate of from eight to ten every day. In so doing they incur perhaps most of the criticism to which they are subjected. A reference to hear and determine should only be resorted to by rich and earnest litigants. It is on the whole the most expensive mode of trial, and the slowest, even when haste is especially sought. The stock company of referees is certainly very limited as compared with the whole bar; and one soon comes to see the tangible influence that brings this or that man into favor of this or that judge. The young briefless son of a powerful politician, of whose learning and ability litigants need never become rampant to avail themselves, is sometimes so favored by references as to carry a private court calendar at his office. It is reported that our Code originally almost reached final enactment, with the provision that a judge might refer an issue to not less than one attorney at law. But the legislature enacted the clause as it is, and did not encroach on the prerogatives of the Bench. Thus the judges are left full play to select as referees men from such as know enough to sign their names where the lawyers indicate, all the way to the most distinguished men on the roll. They do that so accurately that the name of each referee in the day's list tells fairly closely the quality and magnitude of the case assigned to him.

While the day has not yet come when a lawyer may go before every judge at the court and say, "Your Honor," with all the eloquence that simple truth inspires, yet no lawyer nor litigant now

need fear any unmerited harm from our local Supreme Bench, and, taken all in all, the present array is one of exceptional training and capacity, and reflects credit on the scheme of popular election.

During the progress of the "Boodle Trials," a Supreme Court justice declared from the bench that he had long wondered why the bar put up with such men as were offered for jury service in that court. One result of those trials was improvement in the quality of juries. The experience in jury-getting at the trials consequent on the Lexow Investigation promises further improvement. But our best citizens, such as the bar would most gladly have on juries, evade that service in every possible way, and juries are not yet what they should be. Constantly ex-jurors volunteer such queer reasons for voting as they have on a given case, as to compel doubt whether trial by jury ever was the bulwark of Gothic liberty. The power of an astute learned judge at a jury trial is now a compensation for a poor jury. A judge with us may, and not infrequently does, estimate a case at the outset; he may baffle attempts to introduce error at the trial, and to a great degree and rightly steer the jury to a conclusion substantially just. Counsel who quarrel with a judge, proceeding thus, only help the tacit purpose of the judge. In nine cases out of ten, juries are not scrutinized, but under pressure of business are taken after one or two formal questions to the entire twelve, just as they are offered. The disaster that may lurk in this might often be avoided by slight questionings.

The writer, lately having a near-sighted opponent, tried a case before an exceptionally prepossessing jury. The court kept the case from the jury, and when it was discharged it was discovered that one of its best men, being a personal enemy of the near-sighted opponent, had been quietly waiting for him.

Not long ago one of our judges, at a trial by the husband against the wife for divorce, on our one statutory ground, asked who a couple chatting and laughing in the courtroom might be. He learned that they were the husband and wife, the latter defaulting on the serious charge against her. He called them before him, and she told him that she was guiltless of the wrong charged to her. Whereupon the matter became one of special inquiry.

Again, recently a reputable attorney, while waiting for his case to be reached in one court, sauntered into an adjoining room where a woman was being badly broken down on cross-examination by her own written testimony as to the same transaction

sworn to by her some years before. On re-direct examination, she detailed at length how that written testimony had been offered to her for two hundred and fifty dollars before the trial, and named this reputable attorney then in the room by accident simply as the man who offered it. She in fact did not know the reputable attorney; he had never seen her before, and the story was a fabrication. On sending up a card to the bench, the judge promptly let this attorney testify.

Again, different law firms may safely combine here in a protracted elaborate scheme of fraud. A retail merchant, for instance, suddenly and without obvious cause fails, either by a general assignment with preferences, or (the latest improved method) by simply delivering all his assets in parcels, under bills of sale, to various kith and kin in payment of alleged indebtedness to each. The wholesalers, who have just vied with one another to furnish the subject matter for this failure, seek redress by law, but they find the way has been from the outset blocked by attachments, replevins, confessed judgments, and receiverships, each proceeding being *prima facie* sound, and represented by some lawyer in apparently hot pursuit of the insolvent, but really in combination with this insolvent's legal representative. The security of the insolvent is thus so complete, that one of them so intrenched, lately under oath at the Court House, said, "Since my failure I have enjoyed perfect peace." Of all this fraud the wholesalers are certain, but the threadbare presumption of the insolvent's purity leaves them without legal resource, save to embalm this misplaced credit on our judgment docket, already in large part a monstrous exhibit of similar doings, which it seems are impossible under the laws of nations of Western Europe.

These are a few of the instances of the chicanery that may thrive here, and which no one would dare enter upon in provincial or sparsely settled communities, where everybody and his allies are known or can be quickly found out.

These instances mean that litigation here, more perhaps as to facts than as to law, is extra-hazardous, making results doubtful or mysterious to the timid. All that has gone before indicates that trials here call for peculiar firmness in the lawyer, — a firmness that comes, even to the man naturally endowed for court work, only by constant practice. As the horse that grades the track may not be the one to win the race, so an office lawyer of respectable learning and ability may be no match in a trial

against a man inferior to him as a general lawyer, but who tries cases nine months out of twelve. Trial lawyers who have been out of court practice here for several years shrink from returning to it. The man who tries cases nine months out of twelve here learns law. The distinction between attorney and counsel is now more marked than ever, and the number of lawyers who have counsel try their cases increases.

Young men on first coming to this city covet places in the big offices. Some such offices hire an additional room merely for such comers to sit in. The writer knew of such a room where these young men, nearly a score of them, and in excess of the available chairs, were licensed to exchange their items of information and speculative opinions uninterruptedly till nature took its course with each. There are a few successful lawyers who keep a hand out constantly for the best material of the leading law schools, and not only use it to keep the make-up of their firms in a constant state of flux, but send out from their office new firms of importance. Most of the members of heavy law firms dissuade young men from coming to them, and pray there may be a "close season" of at least three years on young lawyers. There are instances where the merit of new coming young men is impressive, in which prominent lawyers have generously bestirred themselves to procure beginnings with small firms for the tyros. There are instances too of young men coming into brilliant success and grand prizes by clinging to a big office, but these are a very small percentage of all who try for it. In some such cases men must submit to years of routine of such quality as watching the calendar. In fact, the writer once heard a keen counsel allege in open court, when his opponent's clerk was wanted but could not be found, "Oh, he can't come. My learned adversary keeps that man in his office just to swear to affidavits all day long to meet the exigencies of his practice." The useful clerk in a large office must not flinch at having to argue in court legal propositions that his employers are hurried into, but which are obviously preposterous. Rivalry between aspirants in the same office is not always inspiring and generous, but partakes of the nature of a suppressed family quarrel.

Sometimes a thoroughbred but anonymous lawyer maintains for years simply a salaried place with a heavy firm, and, lacking the knack to become part of it, faces the cold world when his own blood is no longer of full warmth. Usually after a year

this person is seeking a salary again. Clients seem to incline against one who has for years persisted in drowning himself in a tumbler. They like those who try for themselves young. A short term of service in the office of a busy practitioner is no doubt useful; but, taking the bar as a whole, the largest percentage of cases in which a fair success has been made is of those who strive early in life for professional identity. "To be thrown upon one's own resources is to be cast into the lap of luxury," Franklin asserts. This no doubt means when the chief resource is youth.

The student just leaving the law school may guess from such commonplace existing circumstances as have been here set forth how widely our local practice of law differs from his school duties of evolving the eternal verities out of printed statements of fact in selected cases under the kindly guidance of a professor. Such student will quickly foresee how he must soon face the dilemma, "Shall I be intrinsically the lawyer (like Lord Mansfield) at the risk of only fifteen hundred dollars a year, or shall I refuse to quarrel with my bread and butter, and make my success conspicuous by unlimited creature comforts?" This question each man must settle for himself. Those who decide in favor of bread and butter uniformly shift upon fate all responsibility for their choice.

Any law school worthy the name develops in her sons an incapacity to choose any but the lawyer's side of this dilemma, and in that alone inclines men to the ways of pleasantness and peace. This article is not pessimistic, but it does not favor the so-called new but really destructive methods. The lawyer, thoroughbred and conservative, who seeks to find the facts as they are immutable and apply to them frankly the law as it is, who avoids the meretricious risk and incidents of public trial, still exists.

The amount of good such lawyers do, unheard of, is enormous. The service such a lawyer renders his client is of great intrinsic value; it is suitably rewarded. The relation of attorney and client in this light, and not as a conspiracy to do all that self-interest may prompt, and which by defect of laws is not yet a state-prison offence, may still be found, and merits all that has been eloquently said of it.

The careers of the present leaders of our bar teach nothing with greater certainty than that

"Fearless virtue bringeth boundless gain."

Thomas Fenton Taylor.

THE TRIAL OF CRIME IN FRANCE.

THE reports of the Nayve trial at Bourges published in the daily press will have filled Anglo-Saxon readers on both sides of the Atlantic with a sense of the superiority of their own more even-handed criminal procedure as compared with the system of badgering the accused in practice among our French friends.

Not to caution the prisoner against incriminating himself, but to goad him on by provocation into admissions, is not what we consider a proper part for a President of a Court of Assize to play. To interrogate the prisoner and receive the evidence of the witnesses without cross-examination is an inversion of what we deem fair towards a man whose life or liberty is at stake.

Justified, however, as such reflections are, there are details of French criminal procedure which account in some measure for a state of things so abhorrent to our notions of justice, and show that the censure one is too ready to level at the absence of conditions familiar to us as those of the "most elementary fair play," need some qualification.

An essential fact which must be borne in mind to understand French criminal procedure is that the trial in court is not the sole judicial examination of the facts of the case. It is really only a public consecration of the result of two other trials, which have preceded it behind the scenes. The theory is that unless there is overwhelming evidence against the accused, he should never reach an open trial at all. The jury, as it were, are only his final judge. If they acquit the accused, they reverse the decisions of two jurisdictions of legal specialists. The fight before the jury is thus practically a fight between the judges, who have already found him guilty (or he would not be in court), and the accused, who still persists in the assertion of his innocence.

Before the *Cour d'Assises* is reached, the prisoner will have passed through the hands of a *Procureur* (public prosecutor), a *Juge d'instruction* (examining magistrate), the appeal judges assembled as a *Chambre de mises en accusation* (corresponding to our grand jury), and the judge about to preside at the *Cour d'Assises*.

The business of the *Procureur*, apart from his civil functions, is *la recherche* and *la poursuite* of crimes, misdemeanors, and other offences. On a crime coming to his knowledge, it is his duty to

take the necessary measures to bring the delinquent to justice, and, as soon as possible, to transmit police reports, documents, weapons, instruments, utensils, or any other evidence seized, to the *Juge d'instruction*.

The *Juge d'instruction*, who is one of the judges of the Court of First Instance, proceeds at once to the "interrogation" of the accused, and in practice his ability is measured by the ingenuity he displays in bringing about admissions or a confession. As an instance of the methods a *juge d'instruction* will employ, I may mention that in a case some years ago a well known Paris *juge d'instruction* entrapped an accused person by telephoning to him in the name of a friend, supposed to be an accomplice. The matter was commented upon at the time, but the general opinion was that a *juge d'instruction* is entitled to employ any means he chooses to arrive at the truth.

This judge cites all possible witnesses, and takes down their depositions. If he thinks fit, he may visit any place for the further investigation of the crime, provided he is accompanied by the *procureur* as prosecutor. When the investigation of the case is terminated, the papers are communicated to the *procureur*, who after examining them presents his charge to the *juge*. The latter thereupon delivers an "ordinance" declaring the prisoner either guilty or not guilty, and, if guilty, stating whether of a crime, misdemeanor, or petty offence. If declared not guilty, he is forthwith discharged.

When the decision entails trial by the *Cour d'Assises*, and "the charge is sufficiently proved," says the Code, the case passes by the medium of the *procureur* attached to the lower court, to another *procureur* called the *Procureur Général*, attached to the appeal court, a section of which forms the *Chambre des Mises en accusation*, an institution exercising functions more or less equivalent, as we have indicated, to those of our grand jury.

The *Procureur Général* lays the charge before this court, sitting again, as in the case of the *juge d'instruction*, with closed doors. All the papers, documents, and reports are read over at this hearing. After the *Procureur Général* has been heard on the case he withdraws, and the judges decide what they think fit. Thus they may order further investigation of the allegations and evidence, or acquit the prisoner, or alter the charge and, re-labelling the offence, send the case for trial before a lower jurisdiction, or send it on as received to the *Cour d'Assises*.

In the last alternative, the *Procureur Général* draws up a *mise en accusation*, or indictment. This is communicated to the accused, now removed to the lock-up adjoining the court. It is the President's turn to "hear" the accused in private, and make a last effort before trial to extract a confession.

These preliminaries having been completed, the trial in due course comes on, with all the strangely undignified accompaniments which caused so much surprise to Englishmen at home and in America in the Nayve case.

However, it is now seen that, objectionable as the procedure in court may be, unfair as it may appear to the prisoner, and contrary as it is to our notions of justice, a person accused of a crime does not reach the *Cour d'Assises* without ample precautions being taken to establish his guilt. In most cases the judges perform their duties behind the scene, with a great deal more respect for individual freedom and fair play than would appear from the mode of operation in court. In fact, it is rare that an innocent man reaches the *Cour d'Assises*.

The reader will also understand now why an acquittal by the jury seems a slur on the competency of the professional judge.

Such a criminal procedure as I have described, in spite of all its precautions to secure a thorough, if not always fair trial, will of course lend itself to abuse where the judges are influenced by exceptional considerations. Some wag of a bitter temperament once said that, if he was accused of stealing even one of the towers of Notre Dame, he would make haste to put the Belgian frontier between himself and a *juge d'instruction*. Despite the exaggeration of this sarcasm, there are many in France who have had in times gone by to feel its implication was not far from the truth. The fact that there is a movement in France in favor of making the proceedings before the *juge d'instruction* public shows where the weakest place in the system is. Such publicity would be a guaranty for the examining judge as well as for the prisoner, and might help to remove a certain distrust of repressive justice which it cannot be denied still prevails in France. All the reform the Legislature, however, is likely for the present to make, is to allow the accused to be assisted by his counsel at the examinations behind the scene.

Thomas Barclay, LL.B.

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OSTENSIBLE PARTNERSHIPS. — Suppose that A and B hold themselves out as partners, but that as a matter of fact there is no partnership, and A is actually owner of all the property used in the business. What are the respective rights of attaching firm and separate creditors? If A hold B out as the ostensible owner of goods, it is held that a creditor of B who attaches the goods is preferred to a subsequently attaching creditor of A, and, conversely, a creditor of A who attaches the goods gets priority over a subsequently attaching creditor of B. As Cooper, C., remarks in *Hillman v. Moore*, 3 Tenn. Ch. 454, "It is a race of diligence, and he who is first in time is first in right." If this rule applies where A holds B out as ostensible owner, why should it not apply where A holds out B and himself, under the guise of a partnership, as ostensible owners? If it be true that in such a case the first attaching creditor, whether he be creditor of the ostensible firm or of the actual owner, is preferred, then it follows that, as the two sets of creditors have equal rights against the property used in the business of the ostensible firm, both sets would come in *pari passu* on this property in case of the bankruptcy of the true owners; for bankruptcy or an assignment in insolvency operates as an attachment of the bankrupt's property for the benefit of his creditors. To hold that, on the bankruptcy of the actual owner, the creditors of the ostensible firm are entitled to preference in respect to the ostensible firm property on the ground that the actual owner is estopped to deny that such property is firm assets, works out justice as between the firm creditors and the true owners, but entirely disregards the rights of the separate creditors. Thesiger, L. J., says in *Ex parte Hayman*, L. R. 8 Ch. D. 11: "The law relating to ostensible partnerships is founded on the doctrine of estoppel, and though the doctrine of estoppel might be perfectly good as between those who contract with the joint creditors and the joint creditors themselves, I do not see why in the event of bankruptcy the estoppel should apply to the separate creditors whose rights before bankruptcy stand very much in the same position as those of joint creditors," — *i. e.* before bankruptcy they could seize property used in the business as separate property of the actual owners, and joint creditors could seize the

same property in an action against the ostensible partners. The actual decision in *Ex parte Hayman* was that the creditors of the ostensible firm, on the bankruptcy of its members, should be preferred as to the property used in the business to the separate creditors of the actual owner; but the decision is placed squarely on the statutory doctrine of "reputed ownership." Those cases in this country which reach the same result (*Kelly v. Scott*, 49 N. Y. 595; *Thayer v. Humphrey*, 64 N. W. Rep. 1007 [Wis.]) are not to be justified on statutory grounds, and are therefore open to criticism. The recent case of *Broadway National Bank v. Wood*, 43 N. E. Rep. 100 (Mass.), correctly holds that, on the insolvency of the true owner of property used in the business of an ostensible firm, the firm creditors are not entitled to any preference. If, however, the court means to imply that firm creditors, even by a prior attachment of this property, could get no priority, it appears to run counter to a previous Massachusetts decision (*Lord v. Baldwin*, 6 Pick. 348), where an attaching creditor of the ostensible owner was preferred to a subsequently attaching creditor of the true owner.

Other authorities for the view that, in the case of an ostensible partnership, a prior attaching creditor, whether joint or separate, gets a preference over a subsequently attaching creditor, are *Hillman v. Moore*, *supra*; *York County Bank's Appeal*, 32 Pa. St. 446; *Grabenheimer v. Rindskobb Bros.*, 64 Texas, 49; (but see *Baylor County v. Craig*, 69 Texas, 330). In *Van Kleeck v. McCabe*, 87 Mich. 599, where the creditors of the ostensible firm were given preference as to the ostensible firm assets, it is not clear whether the attachment by firm creditors preceded the assignment for benefit of creditors, made by the actual owner.

EXTRA-JUDICIAL OPINIONS.—"Each branch of the legislature, as well as the Governor and Council, shall have authority to require the opinions of the justices of the Supreme Judicial Court upon important questions of law, and upon solemn occasions. This provision was inserted in the Constitution of Massachusetts in 1780, and has been since embodied in substantially the same terms in the Constitutions of Maine, New Hampshire, Rhode Island, Florida, Colorado, and South Dakota.

The courts have interpreted these provisions as intended to secure to the executive and the legislature a reliable source of legal advice, and, with two exceptions (see 70 Me. 583; 12 Col. 466), have universally held that opinions given in accordance with them were purely advisory, and binding neither as decisions nor as precedents. Such opinions, however, place a court in a difficult position, and have been given only with extreme reluctance (see 63 Mass. 604). The opinion must be given without a hearing of the parties, and without the assistance of the research and argument of counsel. Admitting that it is purely advisory, it is an official act, and can hardly fail to be prejudicial to parties adversely interested, and to influence the officials of lower tribunals, as well as to bias the subsequent opinions of the judges themselves if the question comes up for actual decision. Perhaps the most cogent objection to her practice is that it gives the other departments of the government authority to impose upon the judiciary duties not within the scope of their jurisdiction. On this ground a Minnesota statute authorizing advisory opinions was held unconstitutional (10 Minn. 78).

Where the requirement is embodied in the Constitution, however, it

would seem that the court has no alternative but to give the requested opinion. The recent refusal, therefore, by the Supreme Court of South Dakota (66 N. W. Rep. 310) to give an opinion as required by the Constitution is at first rather startling, though not entirely unprecedented. Once before the South Dakota court has declined to give an extra-judicial opinion (54 N. W. Rep. 650), and there is a record of a similar refusal by the Colorado court (12 Col. 466). The first refusal by the Massachusetts court seems to have been in 1787. A memorial to the General Court by the French Consul at Boston, dated June 1, 1787, says, "the Legislature referred the Consideration thereof to the Supreme Court for their Opinion, who for Substantial Reasons declined giving an Extra-judicial Opinion." The Massachusetts Reports contain the records of three more refusals. (See *Answers of the Justices*, 122 Mass. 600; 148 Mass. 623; 150 Mass. 598.) In most of these instances the courts have declined to construe an existing statute, and such refusals have been rested on the ground that the question was likely to come before them for actual adjudication. It is submitted that the same reasons would apply for refusing to render an opinion on the constitutionality of pending legislation, but such opinions have invariably been given. The courts find justification for their refusals in the general language of the Constitutions, and while admitting the right of the other departments to call for opinions, assert the province of the judiciary to decide whether the occasion is one intended to be covered by the Constitution. (See 150 Mass. 598.)

It is submitted that an additional provision to the effect that advisory opinions be considered as personal rather than official, and thus kept from going on the records, would relieve the system of most of its objectionable features, and retain substantially all of its benefits.

NATURE OF THE RIGHTS IN A DEAD BODY.—In the case of *Bogert v. City of Indianapolis*, 13 Ind. 134, there is a curious *dictum* to the effect that the bodies of the dead belong, as property, to the surviving relatives in the order of inheritance, and that they have the right to dispose of them as such. Nowhere else has the law relating to dead bodies assumed quite so commercial a character. To regard a corpse as a piece of property shocks the sensibilities of the average man. The common law did not regard it as such, nor is it generally so regarded to-day. Yet that the surviving relatives, before burial of the body, have a right of some sort which the law will protect, is undeniable.

The novel question of a wife's right to recover damages for the unlawful dissection of her husband's body before burial arose, for the first time, in *Larson v. Chase*, 47 Minn. 307, commented on in 5 HARVARD LAW REVIEW, 285. The same question recently came before the Supreme Court of New York in *Foley v. Phelps*, 37 N. Y. Supp. 471. In both cases it was very justly held that the wife could recover. The only difficulty arises in determining the nature of the right that has been infringed. In *Pierce v. Proprietors of Swan Point Cemetery*, 10 R. I. 227, it was denominated a quasi-property right. This, of course, does not solve the difficulty. In *Foley v. Phelps*, *supra*, a more exact definition was attempted. The court, following substantially the doctrine of *Larson v. Chase*, *supra*, declared that a surviving wife is entitled to the possession of the body of her deceased husband, in the same condition as when

death occurred, for the purposes of giving it proper care and burial. This right of undisturbed possession which vests in the husband or wife or next of kin of the deceased is clearly one that the law can protect, and the decision of the New York court in sustaining an action for its violation seems entirely sound. Even if so clearly defined a legal right did not exist, the courts would probably have no trouble in supporting an action of this sort on some broader ground. It is one of those instances where failure of justice would involve such a shock to every feeling of decency and propriety that the law positively must disclose a principle to cover it. The development in recent times of such rights as the right to privacy shows that the common law is ever ready to expand in response to demands of that nature.

ADEMPMENT OF GENERAL LEGACIES.—That a gift by a testator during his lifetime will often be regarded in law as a satisfaction of a legacy of money under a previously executed will, is clear. But the circumstances under which this so-called ademption of the legacy takes place have not always been sharply defined, and the various rules laid down by judges in attempting to define them led to much confusion in the early cases. It is consequently agreeable to find the subject so clearly and satisfactorily treated as it is by the Michigan court in the recent case of *Carmichael v. Lathrop*, 66 N. W. Rep. 350. The point decided, namely, that a general bequest to one of the testator's children of a share in the residue of his personal estate would be satisfied *pro tanto* by a conveyance of real estate during the life of the testator, is well settled in courts of equity. The importance of the case lies in the fact that it is illustrative of nearly all the leading phases of the doctrine of ademption.

The first and most important rule on the subject is, that, while ordinarily a gift will not adeem a legacy without clear proof of the testator's intention, nevertheless, where the testator is the father of the legatee, or stands *in loco parentis* to him, the gift will be presumed to be in satisfaction of the legacy, in whole or in part, unless a contrary intention appears. Originating in the dislike courts felt for double portions, and their eagerness to presume that a father intended to deal with all his children alike, the rule has been extended so that it now operates universally, regardless of the inapplicability of the original reason. It has been criticised by eminent writers as unfair to legitimate children, who in this respect are in a worse position than illegitimate children or strangers. Story, *Equity Jurisprudence*, §§ 1110 *et seq.* But though it is often difficult to determine whether the testator stood *in loco parentis* to the legatee (see *Powys v. Mansfield*, 3 Myl. & C. 359), wherever that relation is found to have existed the presumption arises, unless the case falls within certain exceptions to the rule. *Carmichael v. Lathrop*, *supra*, illustrates one of the chief exceptions, namely, that where the legacy and the gift are not *ejusdem generis* the presumption will not arise. "Land is not to be taken in satisfaction for money, nor money for land." *Bellasis v. Uthwatt*, 1 Atk. 426. Difficult as it may be to find a reason for this exception, it is as well established as the rule itself. *Holmes v. Holmes*, 1 Bro. C. C. 555; *Evans v. Beaumont*, 4 Lea, 599. That the presumption did not arise in the case under discussion proved immaterial, however, as there was ample evidence of the testator's intention, which is always decisive.

In the early days the presumption would have failed in *Carmichael v.*

Lathrop, for the additional reason that the bequest was of a share in the residue, uncertain in amount, so that the testator could not have known the relative size of gift and legacy, and consequently would not be likely to have intended the one in satisfaction of the other. Story, Equity Jurisprudence, § 1115. But this principle ceased to operate when it came to be held that the ademption of a legacy might be partial, as well as total. *Pym v. Lockyer*, 5 Myl. & C. 29. See, on the entire subject of the ademption of general legacies, Roper on Legacies, Ch. VI.

“THE UNWISDOM OF THE COMMON LAW.” — A somewhat discouraging view of the common law is taken by Mr. J. C. Courtney in a recent address before the Illinois Bar Association. The writer's proposition is that all the learned eulogists of the common law have been mistaken; that, in truth, while great progress has been made in other branches of human learning, the common law has remained stationary, retaining rules which had their origin and meaning in conditions long since passed away. It may be admitted that some rules unsuited to modern conditions have become fixed in our law. The modern mind finds it difficult to see the necessity of a seal, or to understand why a testator's plain intention should be thwarted by the technical rule in *Shelley's Case*. That such rules exist is due to Anglo-Saxon conservatism and to the failure of judges, before yielding to mere antiquity, to consider whether the reasons in which the rules originated are still valid. Few lawyers, however, would agree that such instances preponderate, or that, on the whole, the common law of any given period has not succeeded fairly well in meeting the practical demands of that period. Such a view overlooks the frequent modification of ancient technical rules, and the development of new ones, to meet new conditions, and, in general, the well proved capacity of our law for growth commensurate with the needs of the times.

ONE-MAN COMPANIES AGAIN. — The Queen's Bench Division has had occasion to deal with the question of one-man companies which created some sensation last year in the well known case of *Broderip v. Salomon*, [1895] 2 Ch. 323, noticed in 9 HARVARD LAW REVIEW, 280. In the case in question there were two men substantially interested, and an action was brought directly against them by a creditor of the company. All that the court decided was that while the company was not joined there could be no recovery, and it declined to commit itself on the possibility of an eventual liability on the part of the real promoters. *Nunkittrick v. Perryman*, 12 *The Times* L. R. 232.

There can be no doubt that *Broderip v. Salomon* was meant to strike at one-man companies regardless of their fraudulent intent. Vaughan Williams, J., did talk somewhat of delaying and defrauding creditors, but the Court of Appeal clearly put the decision upon an evasion of the purposes of the Joint Stock Companies Act. It would seem therefore that the decision of the Queen's Bench Division must necessarily be provisional and dependent upon the neglect of the plaintiff to proceed through the company, for it is hardly probable that a lower court would qualify the direct *ratio decidendi* of its superior.

Still we have here not a one-man, but a two-man company. The distinction may be vital, though it would seem not. If the object of the

act be to limit the minimum membership of companies to seven persons substantially interested, it is as difficult to support a company of two or five or six as of one. Yet courts have distinguished cases whose logical results were disagreeable on less grounds than this.

Broderip v. Salomon was, to be sure, a hard case, but after all did it justify such radical statements about one-man companies in general? Suppose A wishes to engage in trade with a limited liability. He takes his trade assets, sells them to the company he has formed, registers the stock he receives as paid in property under the English act for that purpose, and starts in trade. What difference is it to the company's creditors that the stock is owned by one man? They have the assets, the stock is paid in full, as the act requires, as well as if twenty had contributed. How does it differ from a company launched with many shareholders, all of whose stock is bought up subsequently by one man? That must be bad too, but it cannot defraud creditors, and would seem to be within a reasonable construction of the act. Or if not, the company may be dissolved, but why create a new liability? The final outcome of *Nunkittrick v. Perryman* will be interesting.

CONTRACTS — ACCEPTANCE OF PART PERFORMANCE. — The recent case of *Silberman v. Fretz*, reported in 14 New York Law Journal, 1697, though in reality decided upon simple and undisputed grounds, is interesting in its relation to the vexed subject of "divisible" contracts. Under a contract to deliver several parcels of cloth, at different times, the seller delivered only the first parcel, which the buyer accepted. Prior to the delivery of this parcel the seller informed the buyer that he would not be able to deliver the remaining lots at the agreed times; and the buyer therefore knew that this delivery was complete in itself, and accepted it as such. The court rightly held that under these circumstances the buyer became immediately liable for the agreed price of this parcel, no time of payment having been fixed. There was such a distinct waiver of full performance as a condition precedent to payment for this lot as to make it fairly evident, without any necessity of plunging into the obscure question about the "severability," "divisibility," or "apportionment" of contracts, that the defendant has in effect consented to pay at the agreed price for this parcel, whether he gets the rest or not. The case does not, however, help towards the decision of the vexed question as to whether the defendant would have been liable if he had accepted the goods, but not under such circumstances as to show a waiver of further performance. If he had accepted the first lot of cloth, and immediately worked it up, so that returning the goods was out of the question, but expected at the time of acceptance to receive the remainder in due time, it would not seem right that he should have to pay for it at the contract price. He would have to do so in England (*Oxendale v. Wetherill*, 9 B. & C. 441); in Massachusetts (*Bowker v. Hoyt*, 18 Pick. 555), and in some other States; but the New York courts long ago decided to the contrary in *Champlain v. Rowley*, 18 Wend. 632; and the question is still in dispute. The contract in such cases is evidently intended to be entire, and the courts all recognize it as being originally such; but after an acceptance of part performance the question arises whether that part of the contract should not be regarded as completed in itself, and as divided off from the rest of the contract by the acts of the parties. This view, which ex-

plains very many cases, is certainly sound, when the acceptance amounts in fact to a waiver of full performance; but where the buyer at the time of the acceptance of part expects the performance of the whole, there is in fact no such waiver. In order to make him liable, it must be held that the first part of the contract has become, in the eye of the law, divided off from the rest, without the clear consent of the party affected. In considering the desirability of this result, it must be remembered that at all events the buyer can probably be made to pay the bare value of the goods he has had, on a *quantum meruit*; though even this remedy has been denied in New York (see *Mead v. Degolyea*, 16 Wend. 632).

A LAWYER'S DUTY AS AN OFFICER OF COURT. — A question of interest to the profession has come up recently in the English courts in regard to the duties of a solicitor as an officer of the court. In the *Chancery Forgery Case* (*Marsh v. Joseph*), 12 *The Times* L. R. 255, a forger, without authority, used the name of A, a solicitor, in a bogus proceeding, whereby he secured a fund out of court. On the swindler's informing him of this and offering him a share of the costs allowed, A accepted the money and thereby, the court held, connected himself at once with the proceeding as solicitor, and must make good so much of the fund as he could have saved had he promptly investigated the whole proceedings. This is a remarkable decision in that the court found there was nothing to lead A to suspect more than the unauthorized use of his name. The principle of the decision is, that a solicitor acting in non-contentious proceedings is under a duty to bring before the court all matters essential for it to know in order to deal properly with the matter. This proposition is derived from Mr. Justice Stirling's opinion in *In re Dangar's Trusts*, L. R. 41 Ch. D. 178.

It is to be noticed that this case does not go so far as to hold an attorney liable because he knows of some irregularity, but he must have connected himself with the proceedings in his official capacity. He then becomes liable for so much loss as he could have prevented after that. This is important because, from the note on the case in 31 *Law Journal*, 195, it would seem that it has been supposed to stand for the broader proposition. If the case did stand for such a proposition, there would indeed be cause for surprise. Members of the bar are no less averse to becoming informers than any other class of men. It would be impossible to hold a lawyer as guarantor of the regularity of all the steps in a proceeding because some irregularity has come to his knowledge, perhaps so trivial that interference on his part would be characterized as officious.

At a subsequent hearing of the case under discussion (12 *The Times* L. R. 266), the solicitor's partner was held to the same liability as the solicitor himself. However, if this decision causes surprise, the court has erred, if at all, on the right side. The relation in which the profession stands to the public requires that there should be no disposition to treat leniently the shortcomings of its members. To allow consequential damages in such cases is no doubt a hardship, but courts cannot permit loss to result from a defect in the machinery of justice.

The case has been appealed, and the opinion of the upper court will be awaited with interest.

MALICIOUS INTERFERENCE WITH BUSINESS.—The confusion in the law on this important topic seems to be little helped by the cases of *Rice v. Albee*, 164 Mass. 88, and *Lyons v. Wilkins*, 12 *The Times* L. R. 222, 278. The declaration in the former case alleged that the defendant maliciously persuaded a person who was about to buy half of the plaintiff's business, and become his partner, to withdraw from the bargain, to the plaintiff's great loss. The court sustained a demurrer to this declaration, on the ground that the words used by the defendant were not properly set out, nor alleged to be false. The action was treated as being in slander; and the cases on malicious interference with business were shortly declared to be inapplicable, but for what reasons does not fully appear. It is not necessary for this latter form of action that the words used should be alleged to be false. In the case of *Morassee v. Brochu*, 151 Mass. 567, which appears to be similar, the defendant was held liable, though it was not shown that he had said anything untrue. The acts of the defendant Albee were not, to be sure, so fully set out in their malicious character as they should have been; but the declaration was better in this respect than that in *Walker v. Cronin*, 107 Mass. 555. The court's principal ground for refusing to consider the cases on malicious interference seems to have been that no existing business, existing contracts, nor actual relation of employer to employed, were here alleged to have been disturbed. Now although it may be difficult to prove damage to the plaintiff caused by defendant's acts, except in such cases, yet there does not seem to be any theoretical objection to allowing recovery for loss such as is alleged in this declaration. The loss of expected contracts, it is becoming more and more generally recognized, is as much a damage as the breach of existing ones, if it can be proved. Existing business can hardly be regarded as property, and therefore especially to be protected; though the good will of a business may have been recognized as such. Nor can the relation of master to servant be said nowadays to constitute a status in which there is something peculiarly sacred; though such a feeling undoubtedly had weight in the earliest cases on this subject. It is hard to find good ground for distinguishing this case on these points. Though it is not suggested in the opinion, may not the real reason why the court decides for this defendant, and against the defendants in *Walker v. Cronin* and *Morassee v. Brochu*, lie in the fact that here the defendant is a single private citizen, while there they were respectively an official controlling a powerful labor organization, and a Catholic priest speaking authoritatively to his congregation?

Where trades unions are concerned, at any rate, the recent case of *Lyons v. Wilkins*, *supra*, shows that the English courts will unhesitatingly follow *Temberton v. Russell*, [1893] 1 Q. B. 715, and *Flood v. Jackson*, [1895] 2 Q. B. 21. The case being a clear one, the court immediately issued an injunction, upon an interlocutory motion, against the boycotting strikers. The question when an injunction will be granted is practically quite as important in this class of cases as that of damages; little difficulty, however, is found in granting it, beyond the great primary difficulty of determining whether the defendant's acts are in any way tortious. (On this entire subject, which has been frequently noticed in these pages, see particularly Mr. Justice Holmes's article, 8 HARVARD LAW REVIEW, 52; and as to injunctions, 8 HARVARD LAW REVIEW, 227.)

WHAT A BAILOR CAN SELL. — In a short discussion of the nature of a bailor's interest, in the sixth volume of the REVIEW, p. 43, it was maintained that Blackstone was right in saying (2 Com. 453) that "the bailor hath nothing left in him but the right to a chose in action." Consistently with this view, the vendee of a bailor should not be permitted to sue the bailee in his own name. This was formerly the law. As late as 1844 it was urged at Nisi Prius that a sale by a bailor was "merely an assignment of a right of action," and Parke, B., being of that opinion, directed a verdict for the defendant in an action by the bailor's vendee. The Court of Exchequer, however, in disregard of the precedents, held this ruling of the learned judge to be a misdirection; and this innovation in procedure must now be regarded as established. 3 HARVARD LAW REVIEW, 342, n. 1.

But Blackstone's statement should still control in settling the substantive rights of the parties, and is believed to be the only ground upon which certain decisions can be supported. For example, in *Saxeby v. Wynne*, 3 Stark. Law of Evidence (3d ed.), 1159, A deposited goods with B and then sold them to C, and afterwards directed B to deliver them to D. B, it was decided, was not guilty of a conversion in delivering them to D. If C was simply the assignee of A's chose in action against B, the decision was clearly right, for A could not have recovered against B. If, on the other hand, C acquired a full title as owner of the goods, the decision must be wrong. *Jones v. Hodgkins*, 61 Me. 480, is a similar case in favor of the bailee.

It is familiar learning that one who acquires the possession of goods as a fraudulent vendee holds the title so acquired as a constructive trustee for the vendor, and that this fraudulent vendee may, like any trustee, pass the title to a *bona fide* purchaser free from the equitable encumbrance. Suppose, however, that the defrauded vendor simply sells without delivering possession. The fraudulent vendee gets not the *res*, but a conditional right *in rem*, the right to have the *res* on paying the purchase money. His legal right is the same as if he had received possession at the time of the sale, and had immediately given back the possession to the vendor as a security for the purchase money. In other words, he is substantially a pledgor, and has like any bailor only a legal chose in action. And this legal chose in action, which he obtained by fraud, he holds as a constructive trustee for the defrauded vendor. If, therefore, he purports to sell the goods to an innocent purchaser, the latter will acquire only the assignment of this legal chose in action subject to the equitable encumbrance in favor of the defrauded vendor. The *bona fide* purchaser, therefore, and not the original vendor, will be the victim of the rascality of the fraudulent vendee. This was the result of the decisions in *Globe Co. v. Minneapolis Co.*, 44 Minn. 153, and *Dean v. Yates*, 22 Ohio St. 388.

If the bailee should deliver the goods to the bailor in ignorance of a prior sale by the latter to A, no one, it is believed, would regard the bailee as liable to A for a conversion. The bailee's position would be analogous to that of a debtor who had paid his creditor in ignorance of a prior assignment of the debt to A. In each case the right of action is extinguished by fulfilment of the obligation.

But there is another mode of extinguishing the bailor's right of action after a sale by him to A. The bailor may receive from the bailee an agreed price for the goods, and in consideration thereof may authorize

him to keep and deal with the goods as his own. If the bailee has acted in good faith, A should be without remedy against him. In *Newman v. Newman*, L. R. 28 Ch. D. 674, a trustee who received from the *cestui que trust* a relinquishment of the latter's equitable claim, without notice of a prior assignment by the *cestui que trust* to A, prevailed against A. The right of the bailee would seem to be indistinguishable in principle from that of the trustee.

The decision in *Nicholson v. Harper*, [1895] 2 Ch. 415, is, however, inconsistent with the doctrine here mentioned. The bailor, after selling to A certain goods in the possession of a warehouseman, persuaded the latter to loan him money on the security of the goods. Mr. Justice North decided that the innocent warehouseman must deliver the goods to A without getting repayment of his loan to the bailor. The case was argued and decided wholly upon the effect of the Factors Acts, which were rightly held not to help the warehouseman. But the real strength of the bailee's case, that A was a mere assignee of the bailor's chose in action, seems not to have occurred to the court or counsel. If a bailor should pledge goods for present and future advances, and then sell them to A, and after the sale receive further advances from the pledgee, who had no notice of the sale to A, would the court say that A, in order to get the goods, must repay the money loaned before, but not the money loaned after the sale by the bailor? No such distinction ought to be made, and it is difficult to believe that it would be made.

RECENT CASES.

ADMIRALTY — DAMAGES IN TORT — ONE THIRD OFF NEW FOR OLD. — In a collision of two ships equally in fault, one suffered so that new parts were necessary. *Held*, that the damages must be estimated at the full value of the new parts rather than by deducting one third the cost of the new as of more value than the old parts before the accident; that the rule one third off new for old was applicable to insurance as a contract liability, but did not apply to torts, for the injured party must not be put to expense in order to be re-established. *The Munster*, 12 *The Times* L. R. 264.

The distinction is settled law; and the universal law of appraising costs of repair in insurance is not applied to injuries arising from negligence and causing liability in tort. *The Gazelle*, 2 W. Rob. 281; *The Clyde*, Swabey, 24; *The Pactolus*, *Ibid.* 124. The American law follows the English. *The Baltimore*, 8 Wall. 386. Though the real obligation in either case is to pay for the actual damage only, it is more equitable that the party in fault should pay for the unavoidable increase in the value of the property by the new materials, than that the innocent owner should have to pay to be in as good a position as he held at first.

AGENCY — DUTY OF SOLICITOR AS OFFICER OF COURT. — *Held*, that a solicitor, on connecting himself with proceedings whereby a fund had been obtained out of court should investigate and see that the court has been informed of everything necessary for a proper disposition of the matter before it. For failure to do so he must make good a loss that could have been prevented by prompt action, though there was nothing to lead him to suspect anything wrong. *The Chancery Forgery Case (Marsh v. Joseph)*, 12 *The Times* L. R. 255, 266. See NOTES.

BANKRUPTCY — BANKRUPT'S DEBTOR — BANKRUPT'S RIGHT TO SUE. — An assignee in bankruptcy under the Bankruptcy Act of 1867 was appointed for plaintiff after this action of assumpsit had been begun. The assignee did not enforce plaintiff's claim against defendant, and the assignee's right to enforce it was now barred under § 5057 of the Bankruptcy Act. It was urged for defendant that by the assignment in bankruptcy a bankrupt is divested of all right to sue his debtors. *Held*, that "notwithstanding the assignment under the Bankruptcy Act, there is left in the bankrupt

a right which makes a title good against all the world except his assignee and creditors," and that plaintiff is therefore entitled to prosecute this action. *Lancey v. Foss*, 33 Atl. Rep. 1071 (Me.).

This decision is unexceptionable. The Bankruptcy Act is silent on the question here presented; no common law principle requires a different decision of the point; in point of natural justice the argument is altogether in favor of the decision as made. "It is no defence to the debt that the creditor has become a bankrupt; and if an assignee, after notice, permits a pending suit to proceed in the name of the bankrupt for its recovery, he is bound by any judgment that may be rendered." Per Waite, C. J., in *Thatcher v. Rockwell*, 105 U. S. 467. In accord with the principal case, see *Sawtelle v. Rollins*, 23 Me. 196; *Conner v. Southern Express Co.*, 42 Ga. 37; *contra*, *Mounts v. Manhattan Co.*, 41 N. J. Eq. 211; on an earlier Bankruptcy Act, *contra*, *Berry v. Gillis*, 17 N. H. 9; *Deaderick v. Armour*, 10 Hump. 588.

BILLS AND NOTES — ALTERATION — PRESUMPTION. — Where the plaintiff sought to recover on a note bearing evidences of alteration, *held*, that he must show that the alteration took place before negotiation by maker. The rule applies to all alterations of written instruments that there is no presumption as to the time they were made. *Goodin v. Plugge*, 71 Fed. Rep. 931.

Here is an unequivocal statement of the general rule which it is believed represents the existing state of the law both in England and in this country. The American courts have, to be sure, spoken strictly with reference to each case as it came up, but the decisions taken together completely bear out the broad doctrine laid down. *Hulls v. Barnes*, 11 N. H. 395 (promissory note); *Ely v. Ely*, 6 Gray, 439 (deed); *Crossman v. Crossman*, 95 N. Y. 145 (will); and see 1 Greenleaf Ev. 564. In England there is a seeming confusion, bills and notes being the only instruments to which the rule of the principal case is in terms applied. Stephen's Digest, Ev., art. 89; *Johnson v. Duke of Marlborough*, 2 Stark. 313. It is submitted, however, that the apparent difference in the rules regarding these and other documents is a matter of phraseology only, and that the effect is simply that the plaintiff must always make out his case. Clearly that is all that a presumption of alteration subsequent to execution amounts to. *Cooper v. Beckett*, 4 Notes of Cases, 685; *Williams v. Ashton*, 1 Johns. & Hem. 115; and in *Doe v. Catmore*, 16 Q. B. 745, relied on to show that an alteration in a deed is presumed to be before execution, the remarks are only dicta, the jury having been directed to judge from the deed itself.

BILLS AND NOTES — ANTECEDENT DEBT — PAYMENT BY NOTE. — *Held*, that taking a note does not operate as an absolute payment of an existing debt. *In re Scott*, 24 N. E. Rep. 1079 (N. Y.).

The decision is so clearly in accordance with the overwhelming weight of authority that it seems somewhat singular that the court should have been so evenly divided. As an original question, something perhaps might be said in support of the view that receiving a note from a debtor should have the same effect as receiving a specialty, and discharge the prior obligation. But it has long been well settled in England, and in most American jurisdictions, that merely taking a note is presumptively only a conditional payment of a pre-existing debt. While the note runs, the right of action on the original claim is suspended, but it revives if the note is not paid at maturity. In a few States — Maine, Vermont, Massachusetts, Indiana, and Louisiana — a contrary presumption prevails, to the effect that the execution of a note is an absolute discharge of prior indebtedness. Everywhere these presumptions are rebuttable by evidence; if the parties show an intention that the debt shall or shall not be completely extinguished by the note, such intention will be given effect.

CONSTITUTIONAL LAW — CITY ORDINANCE — STATE DISCRIMINATION. — *Held*, that an ordinance requiring all peddlers who were not residents of the city, selling goods within the city, to pay a license tax, is in violation of the Constitution of the United States, art. 4, § 2, providing that "the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States." *McGraw v. Town of Marion*, 34 S. W. Rep. 18 (Ky.).

This decision seems open to doubt. A statute drawing a discrimination strictly upon State lines is opposed to this clause of the Constitution. *Cooley on Taxation*, 99. But the present case is somewhat different. Here the exemption from tax applies, not to the entire Commonwealth, but only to a very small fraction of it; Kentucky as a whole derives no benefit from the exemption. Can it be said that the citizens of other States are deprived of any privileges which the citizens of Kentucky enjoy? The other difficult question, as to whether the ordinance was repugnant to the grant by the Constitution to Congress of the power to regulate interstate commerce, was not touched upon by the court. *Emert v. Missouri*, 156 U. S. 296.

CONSTITUTIONAL LAW — COLLATERAL ATTACK — DE FACTO OFFICERS. — To an indictment for offering a bribe to a city commissioner the defendant demurred, on the ground that the act under which the officer was performing his duties was unconstitutional and void. *Held*, that the constitutionality of the act could not be attacked collaterally before its validity had been decided by an authoritative decision in the courts of the State. Shanck, J., dissenting. *State v. Gardner*, 42 N. E. Rep. 999 (Ohio).

This is interesting as a case of first impression in the State on a doubtful point of law. The maxim that there can be no *de facto* officer unless there is a *de jure* office, which is illustrated by the leading case of *Norton v. Shelby County*, 118 U. S. 425, is repudiated, and that case is distinguished. The decision is in accord with *State v. Carroll*, 38 Conn. 449, and shows the probable tendency of the courts in this direction. The case is valuable for the closely reasoned opinion of Spear, J.

CONSTITUTIONAL LAW — INDEMNITY FROM TAXATION. — A charter granted in 1856 exempted a bank from taxation. In 1870 a constitutional provision was adopted which prohibited such exemption. The bank failed in 1869, and in 1880 by order of court the receiver sold the charter at auction, T. being purchaser. But the shares of stock were not transferred to T. by the owners. T. and others organized and carried on business, claiming to act under the charter, and were recognized as a corporation in 1881 by the passage of a legislative act changing the corporate name. Suit by the State for the collection of taxes. *Held*, that the exemption was a personal privilege in favor of the corporation specifically mentioned, which did not pass with the sale of its charter. *Bank v. Tennessee*, 16 Sup. Ct. Rep. 461.

The court doubts the validity of the sale of the charter, and the effect of the subsequent reorganization, but bases its opinion upon the ground that the present organization is not in fact or in law the body originally incorporated. The decision accords with the established rule of the Supreme Court. See especially *Memphis County Commissioners*, 112 U. S. 609, at 619, 623, and cases cited. It is interesting to think how the court which decided *New Jersey v. Wilson*, 7 Cranch, 164, might have dealt with such a question.

CONTRACTS — DIVISIBILITY — ACCEPTANCE OF PART PERFORMANCE. — Under a contract to deliver several lots of cloth at different dates, the vendor delivered only the first lot; which the vendee accepted, though previously informed that the remaining lots could not be delivered according to the contract. *Held*, that the contract, though originally entire, had been so divided by the acts of the parties, that the vendee was liable on the contract for the lot he had accepted. *Silberman v. Frels*, 14 New York Law Journal, 1697. See NOTES.

CONTRACTS — MARRIAGE A VALUABLE CONSIDERATION. — The defendant, before his marriage and in consideration thereof, in pursuance of an oral agreement, conveyed his real estate to a third party, in trust to reconvey it to himself and his wife after marriage, this being done by him to defraud his creditors, but the wife being innocent. This action is brought by a creditor to have the conveyance set aside. *Held*, that marriage was sufficient consideration to support the grant. *State ex rel. Harrison v. Osborne*, 42 N. E. Rep. 921 (Ind.).

However undesirable it may seem, it is undoubtedly law that marriage is a valuable consideration, and will support an ante-nuptial grant to the woman, even if made to defraud creditors. 1 Bishop's Law of Married Women, §§ 780-782, and cases cited. This view seems irreconcilable in principle with another doctrine equally well settled in the United States, viz. that a post-nuptial grant made in consideration of marriage and in fulfilment of an oral ante-nuptial agreement is void as against creditors. *Manning v. Riley*, 52 N. J. Eq. 39; Browne on the Statute of Frauds, § 223, and cases cited. The cases of the latter class might well be assimilated to those of the former, as the grant is in them no more voluntary than when made before marriage in pursuance of a non-enforceable agreement. 1 Bishop's Law of Married Women, §§ 810, 811; *Hussey v. Castle*, 41 Cal. 239; Ames's Cases on Trusts (2d ed.), § 7, note 1, p. 181.

CONTRACTS — STATUTE OF FRAUDS — PART PERFORMANCE. — Defendant made an oral ante-nuptial agreement with his intended wife that, in consideration of their marriage and of his having charge of her infant son, the plaintiff, during his minority, he would in his will devise to this son and any children of their marriage in equal shares. The marriage was consummated, and the husband took control of the boy. Three children were born of the marriage. The husband died, making no provision for the plaintiff, who thereupon brought this action for a specific enforcement of the contract. *Held*, that marriage was a sufficient part performance to render the contract enforceable in equity. *Newack v. Berger*, 34 S. W. Rep. 489 (Mo.).

The court might have found other grounds on which to rest their decision, but they base it squarely on the sufficiency of the marriage. This is *contra* to the entire weight

of authority, the opposite doctrine prevailing, though much regret is expressed that it should be law. *Ungley v. Ungley*, L. R. 4 Ch. D. 73; Browne on the Statute of Frauds (4th ed.), § 459. This case is one of first impression in Missouri, and is a step in the right direction.

CORPORATIONS — ATTEMPT AT INCORPORATION — PARTICIPANTS LIABLE AS PARTNERS. — Action against the defendants as partners on a note signed by the Florida & C. Co. The defence was that the defendants were not a partnership, but a corporation organized under the laws of Tennessee. *Held*, that though on the facts the defendants are not a corporation *de jure, de facto*, nor by estoppel, they are liable as partners. *Duke v. Taylor et al.*, 19 So. Rep. 172 (Fla.).

It is well established that the individual members of such an association are liable in some form of contract action. But is a partnership the necessary legal consequence of an attempt like this at incorporation? It certainly is not. The participants may be liable as joint principals on the ordinary principles of contracts and agency, and it was so held in *Johnson v. Corser*, 34 Minn. 355, and the recent case of *Roberts Mfg. Co. v. Schlick*, 64 N. W. Rep. 826 (Minn.). It might be a matter of great practical importance whether defendants are liable as partners or not; for instance, if the association should become bankrupt, the bankruptcy rule of firm assets to firm creditors and separate to separate would apply should the defendants be treated as a partnership. In accord with the principal case, see *Martin v. Fewell*, 79 Mo. 401, and *Farnum v. Patch*, 60 N. H. 294, 324-330.

CORPORATIONS — "COMPANIES ACT" — COLORABLE SHAREHOLDERS. — Action against two, promoters and shareholders of a corporation, on debt due from corporation for services. There were seven shareholders, the minimum required by the "Companies Act," none of whom held more than one £1 share except the two defendants, who owned about £3,000. *Held*, that an action does not lie directly; at least, corporation must certainly be joined. *Broderip v. Salomon*, [1895] 2 Ch. D. 323, distinguished; *Munkittrick v. Perryman*, 12 *The Times* L. R. 232. See NOTES.

CRIMINAL LAW — FUGITIVE FROM JUSTICE — INTERSTATE RENDITION. — Defendant was extradited from Illinois for an act of burglary, and was committed for trial. Later, the prisoner was arraigned and convicted on an information for another and different charge of burglary. *Held*, that notwithstanding his objections, a prisoner may be prosecuted for any indictable offence committed within the borders of a State, without first having had an opportunity to return to the State by which he has been surrendered. *In re Petry*, 66 N. W. Rep. 308 (Neb.).

This point is fully discussed in the important case of *Lascelles v. Georgia*, 148 U. S. 537. It is there held that fugitives from justice have in another State no right of asylum in the international sense. If, as is generally admitted, a fugitive from justice may be kidnapped or unlawfully abducted from the State of refuge, and be thereafter tried in the State to which he is forcibly carried without violating any immunity secured to him by the Constitution or laws of the United States (*Mahon v. Justice*, 127 U. S. 700), it is difficult to understand upon what sound principle can be rested the denial of a State's authority or jurisdiction to try him for another and different offence from that for which he was surrendered. The conflict of authority on this point has arisen from a failure to distinguish the rule regarding international extradition laid down in *U. S. v. Rauscher*, 119 U. S. 407, from interstate rendition.

CRIMINAL LAW — LARCENY — CONTINUING TRESPASS. — *Held*, that one stealing goods in Canada and bringing same into Vermont is guilty of larceny in Vermont, on the ground that the legal possession of the property remains in the true owner, and, the taking being felonious, that every asportation is a fresh taking. *State v. Morrill*, 33 Atl. Rep. 1870 (Vt.).

The anomalous doctrine of continuing trespass, by which one who had stolen goods in one county in England was held to have committed larceny in every county into which he took the stolen goods, was not extended to cover the case of one who stole goods in a foreign country and brought them into England. *Regina v. Anderson*, 2 East P. C. 772; *Rex v. Prowes*, 1 Moody C. C. 349. The principal case, following an earlier Vermont case (*State v. Barillett*, 11 Vt. 650), makes this logical extension of the anomalous doctrine. The weight of authority is against the principal case, even in jurisdictions adopting the anomaly as regards stolen goods brought from another State. *Stanley v. State*, 24 Ohio St. 166. In this connection, it is interesting to note that in a recent Massachusetts case not yet in the reports (*Commonwealth v. Parker*), a divided court (four against three) held that one who embezzled property in another State, and brought the embezzled property into Massachusetts, could be punished in Massachusetts for embezzlement.

DAMAGES — CONTRACTS — ANTICIPATORY BREACH. — Purchaser of a cargo "to arrive" repudiated the contract. Before its arrival, the seller brought suit, but did not sell elsewhere until after arrival. The market was steadily declining throughout this time. *Held*, that the difference between the contract price and the market value at the time of bringing suit (when the repudiation was acquiesced in) should be the measure of damages, as it was unreasonable for the seller to hold back the sale until the day fixed for delivery. *Roth v. Tayser*, 12 *The Times* L. R. 211.

The decision is important; it qualifies the general rule laid down in *Roper v. Johnson*, L. R. 8 C. P. 167. The exact point here decided has not come up in jurisdictions of this country recognizing anticipatory breach. A contrary view is strongly expressed by the court in *Kadish v. Young*, 108 Ill. 170. In so far as the decision makes the time of acquiescence the basis with regard to which the jury are to assess damages, it seems sound, for such acquiescence should terminate the rights and liabilities of the parties with respect to the contract. But it seems open to criticism, in that it makes such rule applicable to those cases only in which the seller would be acting unreasonably in not selling before the day fixed for the delivery by the terms of the contract.

EQUITY — AVOIDING DEED — DURESS. — Plaintiff's husband threatened that he would commit suicide unless plaintiff should execute a deed of her property to defendant to make good a sum embezzled from the defendant by the husband. Plaintiff executed the deed, and now asks that the defendant be compelled to reconvey to her. *Held*, one judge dissenting, that the husband's threats to commit suicide did not constitute duress. *Girty v. Standard Oil Co.*, 37 N. Y. Supp. 369.

The earliest notion of duress was peril of life or limb. In time it became the rule that such threats constituted duress as would put in fear a person of ordinary firmness; and the courts generally follow that to-day. *U. S. v. Huckabee*, 16 Wall. 423; *Tiedeman on Real Prop.*, § 796, and cases cited. As the ground for allowing an instrument to be avoided for duress is that the maker did not exercise free will, it would seem that the mind of the particular person should be considered, regardless of what effect the threats might have had upon a person of ordinary firmness. 14 *Am. Law Reg.* 201.

EVIDENCE — DYING DECLARATIONS. — *Held*, that it was not error to admit a dying declaration to the effect that the prisoner had threatened to kill declarant, his wife, if she should leave him. *People v. Beverly*, 66 N. W. Rep. 379 (Mich.).

If dying declarations must relate to "the circumstances of the death," this statement was clearly inadmissible. In view of the fact that courts, during recent years, have so strictly limited and qualified this exception to the hearsay rule, the correctness of this holding seems at least doubtful. *People v. Davis*, 56 N. Y. 95. In *Hackett v. People*, 54 Barb. 370, statements of this character were excluded.

FOREIGN CORPORATIONS — RIGHT TO DO BUSINESS IN STATE. — Where a foreign building and loan association has lent money on a mortgage in the State without complying with the statutory provisions relative to foreign corporations, *held*, that the mortgage may be foreclosed, but the recovery will be limited to principal and interest and taxes paid; it will not include bonuses, premiums, and other dues as provided by its by-laws. *Guarantee Co. v. Cox*, 42 N. E. Rep. 915 (Ind.).

The case is novel, but seems right. The first point is covered by the decision in *Elston v. Piggott*, 94 Ind. 14, which allows recovery for money lent, though the transaction of business be prohibited. The second point is covered by the statute, the association having no authority to do a building and loan business in the State.

JUDGMENT — ADMINISTRATION — COLLATERAL ATTACK. — Where A's land has been sold under a decree made at the instance of A's administrator, *held*, that A's children may attack the proceedings collaterally by showing that A did not in fact die till after the sale. *Springer v. Shavender*, 23 S. E. Rep. 976 (N. C.).

While this decision is in accord with the great weight of authority (see *Scott v. McNeal*, 154 U. S. 34, where the cases are collected), it is to be regretted that the other side of the question has not received more attention. In *Roderigus v. Savings Inst.*, 63 N. Y. 460, it was held that the surrogate had power judicially to determine the fact of death, and his judgment could not be collaterally attacked. The correctness of this view has been ably maintained in 14 *Am. Law Rev.* 337, and in 1 *Woerner on Adm.*, 208 *et seq.*, where it is contended that jurisdiction in the surrogate to determine the fact of death is necessary to the exercise of his functions. See also dissenting opinion of Freeman, J., in *D'Arnement v. Jones*, 4 Lea (Tenn.), 251. In *Scott v. McNeal*, *supra*, the exercise of this power on the estate of a living person was held to be depriving a man of his property without due process of law. Under a proper form of notice it does not seem to differ from taking an absent debtor's property by attachment. 22 *Central*

Law Journal, 484; Vanfleet, Collateral Attack, § 608 *et seq.* One judge in the principal case dissented, on the ground that, though the owner himself could not be estopped, the children should be, as they were parties to the sale. The distinction can hardly be supported, since the objection to jurisdiction in the case, if admitted at all, would seem to strike at the root of the whole proceedings.

JUDGMENT LIENS — PRIORITIES. — *Held*, that when a junior lien has been enforced before a senior, the holder of the senior lien cannot compel a payment of his judgment out of the proceeds of sale in the hands of the junior lien-holder, but has a right to levy execution on the property in the hands of the purchaser. *Dysart v. Branderth*, 23 S. E. Rep. 966 (N. C.).

This case represents the great weight of authority on this point. In two States, South Carolina and Georgia, the opposite view is held, and a sale under the junior lien extinguishes the senior lien, leaving its holder to come upon the proceeds of the sale for satisfaction. *Blohme v. Lynch*, 26 S. C. 300; *Jones v. Wright*, 60 Ga. 364. The former view seems to regard a judgment lien as in nature a *ius in re*, — a doctrine which the text-writers expressly repudiate, although they cite and approve the cases *in accord* with the principal case. 1 Black on Judgments, § 400; Freeman on Judgments, § 338.

PARTNERSHIP — OSTENSIBLE PARTNERSHIP — RIGHTS OF FIRM CREDITORS. — *Held*, that the creditors of an ostensible partnership are not entitled to preference over the creditors of the true owner, on the latter's assignment in insolvency, in respect to the property used in the business of the ostensible partnership. *Broadway National Bank v. Wood*, 43 N. E. Rep. 100 (Mass.). See NOTES.

PROPERTY — CONTRIBUTION BETWEEN TENANTS IN COMMON. — Complainant, by a bill in equity, asked for the sale of certain property owned by him as tenant in common with the defendant. The bill also asked for a contribution by the defendant of his proportional part of sums expended by the complainant in necessary repairs and in taxes. The defendant in his answer asked for an account of rents, and alleged that the repairs had been made against his wish. *Held*, that a sale of the property should be made, and an account and settlement of the estate had. The complainant, in accounting for rents, may credit himself with the sums spent in repairs and taxes, but he cannot compel a direct contribution for them from the defendant. *Williams v. Coombs*, 33 Atl. Rep. 1073 (Maine).

A tenant in common cannot at law get contribution from his cotenant for unauthorized necessary repairs. *Leigh v. Dickeson*, L. R. 12 Q. B. D. 194; *Calvert v. Aldrich*, 99 Mass. 74. Nor is he entitled to it in equity, except as in the principal case, where the matter comes up on a bill for partition. Story, Eq. Jur. § 1237. This seems correct. A cotenant should not be obliged to go into his pocket for unauthorized repairs; but when the estate is to be divided, he cannot be allowed to acquire the improved property without paying in some way for the improvements. In *accord* with principal case, see as to repairs *Swan v. Swain*, 8 Price, 518, and as to taxes, *Kites v. Church*, 142 Mass. 586.

PROPERTY — EASEMENT OF LIGHT AND AIR — IMPLIED GRANT. — Where a tract of land owned in common was divided into two lots by an interchange of quitclaim deeds, and there was a store on one lot with windows receiving light and air across the other, *held*, that these windows cannot be closed by the owner of the latter lot if the light so received is reasonably necessary to the beneficial enjoyment of the building. *Greer v. Van Meter*, 33 Atl. Rep. 794 (N. J.).

It is plain that the reasons existing in this country for refusing to allow an easement of this kind to be gained by prescription are equally applicable to the facts of the principle case, yet such a prescriptive right is not recognized in New Jersey. *Hayden v. Dutcher*, 31 N. J. Eq. 217. The same question was decided the other way, and the inconsistency of the position taken in the principal case, pointed out in *Keats v. Hugo*, 115 Mass. 204, and *Mullen v. Stricker*, 19 Ohio St. 135.

PROPERTY — JOINT FINDERS — INTENT. — One of several boys playing along a railroad track picked up an old stocking in which something was tied, and, after he had swung it about in play for a time, another of the boys snatched it, or, it having been thrown away by the first boy, the second picked it up, and began striking the others with it. In this way it passed from one to another. Finally, while the second boy was swinging it, it broke open; and it was then found that the stocking contained money. All of the boys examined the contents of the stocking together, and the money was given to an officer to await the appearance of the true owner. The latter was never found. *Held*, that, efforts to find the true owner having been unavailing, the money belonged to the boys in common. *Keron v. Cashman*, 33 Atl. Rep. 1055 (N. J.).

The decision is rested on the ground that, as none of the boys treated the stocking

as anything but a plaything or abandoned article, the money within the stocking must be treated as lost property, which was not legally found until the stocking was broken open; that, the boys being then engaged in a common enterprise, the money came under the control of all, and each had the intention to take possession of part or all of it; the boys should therefore be treated as joint finders. The case, on this ground, appears to be sound in principle as on authority. *Merry v. Green*, 7 M. & W. 623; *Robinson v. State*, 11 Tex. App. 403; *Durfee v. Jones*, 11 R. I. 588.

PROPERTY — LANDLORD'S LIEN — BONA FIDE PURCHASER. — A tenant had a crop of corn stored on his premises, subject to a lien in favor of his landlord for unpaid rent. This corn was seized by a sheriff, under an attachment order obtained by the landlord. *Held*, that the sheriff could not hold the corn against one who had purchased it from the tenant without notice of the lien. *Scully v. Porter*, 43 Pac. Rep. 824 (Kan.).

The same result was reached by the Mississippi court in a recent case (*Chism v. Thompson*, 19 So. Rep. 210). The two cases seem correct. These liens, of course, depend wholly on statutes, but there seems to be no good reason, in the absence of express statutory language, why they should be treated differently from common law liens. It was held, however, in *Holden v. Cox*, 60 Iowa, 449, that, unless the goods on which the lien attached were such as the tenant was keeping for sale, the lien held good against a bona fide purchaser.

PROPERTY — PURCHASE FOR VALUE — JUDGMENT CREDITOR. — *Held*, that a judgment creditor is not a purchaser for value, and hence an unrecorded deed takes precedence over a subsequent judgment lien. *Smith v. Savage*, 43 Pac. Rep. 847 (Kan.).

This is the more logical position theoretically, as it is impossible to see how a judgment creditor can be considered a purchaser for value. Freeman on Judgments, § 366. The decision in this class of cases turns on the statute of the particular jurisdiction. In Massachusetts it is provided that an unrecorded deed shall be valid only against the grantor, his heirs and devisees. Mass. Pub. St. c. 120, § 4. The judgment creditor is necessarily protected under this statute. In New York, on the other hand, unrecorded deeds are void only against subsequent purchasers for value and in good faith, and there, consequently, the same result is reached as in the principal case. *Schroeder v. Guernsey*, 73 N. Y. 430.

QUASI-CONTRACTS — EXTINGUISHMENT OF CERTIFICATES OF INDEBTEDNESS THROUGH MISTAKE. — The defendant, the District of Columbia, issued certificates of indebtedness entitling plaintiff to payment for work done on a certain street out of a tax defendant should levy on the abutting property. As the tax was not paid, defendant sold the land to plaintiff, taking these certificates in payment, but title did not pass, since defendant had neglected to secure a lien for the amount of the tax, and the land had been sold to a bona fide purchaser for value, etc. *Held*, that, defendant being liable on the certificates because of its neglect, the surrender of them by plaintiff and their cancellation was between the parties like the payment of so much purchase money, and plaintiff can recover their value in assumpsit, his purchase having been to protect himself, and therefore not voluntary. *District of Columbia v. Lyon*, 16 Sup. Ct. Rep. 450.

In *McGhee v. Ellis*, 4 Litt. 244, the purchaser at an execution sale recovered from the judgment debtor by bill in equity, since the latter did not have title. It is contended that on principle such an action should be maintainable at law. Keener on Quasi-Contracts, 396. The court did not find it necessary to rely on this analogy in the principal case, since it was the case of an involuntary payment to protect the interest of the purchaser. That the certificates were surrendered directly in payment would seem to be no reason for distinguishing the case from a cash payment and an extinguishment of the obligation with the money so paid. It seems difficult to distinguish the principal case on principle from *Homestead Co. v. Valley Co.*, 17 Wall. 153, where it was held that a payment of taxes by one who supposes he is owner is purely voluntary under mistake of law, and hence he cannot recover money so paid. If the cases are not reconcilable, the doctrine of the principal case is preferable. Keener on Quasi-Contracts, 380.

SURETYSHIP — SECURITIES GIVEN TO INDEMNIFY SURETY — RIGHTS OF CREDITOR. — The maker of a note deposited securities with his surety out of which the surety might reimburse himself in case he had to pay the note. Both maker and surety having become insolvent, the payee of the note filed a bill in equity asking that the securities be applied in payment of his note. *Held*, that upon the insolvency of the principal the surety had a right to apply the securities in payment of the note, and to that right the payee, especially in view of surety's insolvency, was entitled to be subrogated. *First Nat'l Bank v. Wheeler*, 33 S. W. Rep. 1093 (Texas).

The cases are in a hopeless state of confusion as to what circumstances, if any, give

a creditor the right to have securities deposited under a contract of naked indemnity applied in payment of the debt to him. It has been held that immediately on the deposit of the securities such an equitable right arises in favor of the creditor. *Moses v. Murgatroyd*, 1 Johns. Ch. 119; *Morrill v. Morrill*, 53 Vt. 74. Again, that such a trust arises in the event of the insolvency of the surety. *Lewis v. Deforest*, 20 Conn. 427. A third view is that if the estates of both the principal and surety are bankrupt, the creditor may compel the securities to be applied in payment of his debt (*Ex parte Waring*, 19 Ves. 345); and a fourth, that the surety, even in the event of a bankruptcy of both the principal and surety, has no recourse upon the securities except to reimburse himself for payments made on the creditor's claim; the particular creditor in such case has no higher right in the securities so held by the surety than has any other creditor of the surety. *Royal Bank v. Commercial Bank*, 7 App. 366; *Poolé v. Doster*, 59 Miss. 258.

The doctrine of *Poole v. Doster*, *supra*, is, it is submitted, the one to be preferred; it gives to the contract under which the securities were deposited the operation which the parties intended it should have; it is not open to the reproach of giving to the particular creditor a preference over other creditors for which he did not bargain, and which the principal and surety did not intend he should have. See 1 HARVARD LAW REVIEW, 326.

TORTS — LUNATIC'S LIABILITY FOR NEGLIGENCE. — *Held*, where a vessel in the exclusive control of one of the joint owners, who has chartered it, is lost through his negligence, he cannot defend an action by the other owners by showing that his want of care was due to temporary insanity, though such insanity was caused by his efforts to save the vessel. *Williams v. Hays*, 37 N. Y. Supp. 708.

In a former adjudication of this same case, the Court of Appeals left open the precise question now passed upon. *Williams v. Hays*, 143 N. Y. 442. There are few decisions on the subject of the liability of insane persons for torts by negligence, and the text-writers appear to be in great conflict. Some of the latter hold that insanity is no defence. 1 Shearman and Redfield on Negligence, § 121; Cooley on Torts, 2d ed., 117. Others incline to the view that insanity should in some cases be a bar. 1 Beven on Negligence, 2d ed., 52-55; Wharton on Negligence, § 88; 2 Jaggard on Torts, 872; Clerk and Lindsell on Torts, 11, 34. The true view seems to be expressed by Mr. Justice Holmes: "If insanity of a pronounced type exists, manifestly incapacitating the sufferer from complying with the rule which he has broken, good sense would require it to be admitted as an excuse." Holmes, *The Common Law*, 109.

TORTS — MALICIOUS INTERFERENCE WITH BUSINESS. — During a strike at plaintiff's manufactory, the defendants, officers of a trades society, picketed the works in the usual way, called out the workmen of another manufacturer merely because he worked for the plaintiff, and wrote threatening letters to the parents of minor employees. The plaintiff asked for an injunction to restrain the defendants from maliciously inducing persons not to enter into contracts with the plaintiff. *Held*, that, though the question of malice was generally one for a jury, still in a clear case the court ought to restrain by injunction the continuance of an act which was unlawful only because malicious. *Lyons v. Wilkins*, 12 *The Times* L. R. 222. See NOTES.

TORTS — MUTILATION OF DEAD BODY. — *Held*, that a wife may recover damages from one who unlawfully mutilates the dead body of her husband before burial. *Foley v. Phelps*, 37 N. Y. Supp. 471. See NOTES.

TORTS — WRONGFUL DISPOSAL OF PLEDGE — ACTION ON THE CASE. — A, owing B \$16,000, deposits with B as collateral security a note for \$25,000. B wrongfully surrenders the collateral note to its maker, but later obtains it from him again, and is ready to restore it to A upon the payment of his debt. *Held*, that, in trespass on the case, A can recover of B \$9,000, the difference between the face value of the note and the amount of the debt, without first tendering payment for the debt or demanding the collateral. *Post v. Union National Bank*, 42 N. E. Rep. 976 (Ill.).

The decision is interesting as bearing on the question of what constitutes conversion by a pledgee, and what is his right of recoupment in damages. This subject was discussed in 9 HARV. LAW REV. 540. The form of action here chosen, viz. "case," was used for the express purpose of avoiding the possible objection which might be urged against trover, that the pledgor gets no right of possession before offering to the pledgee the amount of his indebtedness. Blackburn, J., in *Donald v. Suckling*, L. R. 1 Q. B. 614, 615; Pollock on Torts, 4th ed., 324, 325.

The effect of the defendant's getting possession of the note after once parting with it was carefully considered. As this was an action on the case where only actual damages can be recovered, it was insisted that as the defendant was prepared to return to the plaintiff the identical security which had been given, there was no real damage to

the plaintiff, and hence there should be no recovery. But the court said that the pledgor's cause of action arose when the pledgee first disposed of the note, and nothing subsequent could undo that transaction. The decision was probably correct, although the judge below reached the opposite conclusion. Just as in conversion one can practically force the wrongdoer to buy the converted article, so here in "case," when once the tortious act has been committed, the pledgee cannot take away the pledgor's right of action, or even mitigate damages by tendering the note, unless the pledgor elects to accept it. *Carpenter v. Dresser*, 72 Me. 377.

TRUSTS — PURCHASER FOR VALUE — NOTICE. — *Held*, that a purchaser of a mortgage belonging to a trust estate, who knows the mortgage to be trust property, but who has learned upon inquiry that the trustee has a general power to change the securities, is not protected where the instrument creating the trust provides that the written consent of the beneficiary to such change shall not be necessary. He is chargeable with the knowledge of the contents of such instrument. *Suarez v. De Montigny*, 37 N. Y. Supp. 503.

The view taken tends to make the trustee's right the test in such cases, rather than the purchaser's diligence. It closely resembles the doctrine of agency, which charges one who takes a negotiable instrument, signed "per proc." with knowledge of the contents of the power of attorney creating the authority so to sign. *Altwood v. Munnings*, 7 B. & C. 278. The court, however, does not go to the extent of saying that one who knowingly deals with a trustee does so at his peril.

WILLS — ADEMPMENT OF GENERAL LEGACY. — *Held*, that a general bequest to a child of a share of testator's personalty may be satisfied *pro tanto* by a conveyance of real estate during the life of the testator, where such is the clear intention. *Carmichael v. Lathrop*, 66 N. W. Rep. 350 (Mich.). See NOTES.

WILLS — CONSTRUCTION — VARYING TECHNICAL WORDS. — Devise to A, and, if she have heirs, to her heirs; but if she die without "heirs or heirs of her body," remainder over. A child was born and died. *Held*, that, taking the will in its entirety, with its disregard of precise terms, considering the testator's condition and circumstances, he meant "children"; and so A had but a life estate, and the rule in *Shelley's Case* was not to be applied to give a fee. *Campbell v. Noble*, 19 So. Rep. 28 (Ala.).

The case is an interesting instance of the variation by the court of the strict legal meaning of words of inheritance. Such a variation is warranted under certain circumstances. *Roberts v. Edwards*, 33 Beav. 259; *Symers v. Jobson*, 16 Simons, 267; 2 Jarman on Wills, 6th Am. ed., 91. When the words of a will do not convey a clear meaning in themselves, the court may consider the surrounding circumstances and the condition of the testator in order to discover his intent. Per Lord Wensleydale, in *Grey v. Pearson*, 6 H. of L. Cas. 106; Wigram on Extrinsic Evidence, §§ 10-14; 1 Jarman on Wills, 6th Am. ed., 413, note.

REVIEWS.

COMMENTARIES ON THE LAW OF PRIVATE CORPORATIONS. By Seymour D. Thompson, LL. D. San Francisco: Bancroft-Whitney Co. 1895-1896. 6 Vols., pp. ccli, 6886.

The appearance of this book was heralded by a bookseller's circular, announcing it as "The One and Only Great Work." Since its publication, commendation equally strong has been bestowed by eminent jurists. From this unqualified praise some dissent must be expressed. The book is *not* "the one and only great work," except in the sense that it undertakes to cover the whole ground and discusses various special topics more fully than any other treatise. As a discussion of the crucial difficulties of corporation law, and as a help to their solution, it is not superior to two other books already before the public. That Judge Thompson's work is of great value, no one can doubt. Lawyers cannot afford to ignore it. The writer of this notice has purchased the six volumes, and does not regret his bargain. But, while this book must be used alongside of

Morawetz and Taylor it will not supersede either of those excellent works.

Judge Thompson's book has marked excellences, but is not without defects.

Among the author's most conspicuous merits are courage and earnestness. He writes without having before his eyes the fear of man, not even of man clothed in judicial ermine. He calls a spade a spade, and never hesitates to denounce what he deems error, even though it be indorsed by the weight of authority. As compared with the conventional and non-committal tone of some other legal authors, one might apply to Judge Thompson what was said of Baron Martin on the Bench: he is "like a rough and healthy breeze in an overlaid atmosphere." But the vehemence with which he has espoused certain views on some controverted points has occasionally prevented him from seeing that there are really two sides to the dispute; and his discussion is less valuable than if he had fully realized all the difficulties inherent in the matter.

Again, it is a great merit of the work that it covers various special topics not often so fully discussed in other books on the same general subject. (See, for instance, Chapter 87, on "Right to Inspect Books and Papers.") But the author frequently errs on the side of diffuseness. Probably this is largely due to his desire, expressed in the Preface (pp. viii and ix "to treat every topic with such fulness of detail that the state of the law in respect of it could be learned *from the pages of the work*, and without the necessity of the reader searching the adjudged cases." His motive is praiseworthy, but it was practically impossible completely to carry out the wish; and the attempt has unduly expanded the text. The work would have been worth more if the six volumes had been condensed into three. Moreover, upon some topics the salient points are not brought out as clearly as could be desired. No doubt each chapter contains a few sentences which were intended by the author as a brief summary of the results of his investigations. But these sentences are not always put in such a place or form as to impress their importance upon a reader not already familiar with the subject.

In the citations of authorities some omissions have been noticed. In Vol. 5, s. 5787, under "Devises to Corporations when their Statutory Limit has been Reached," there is no mention of the important case of *Trustees of Davidson College v. Ex'rs. and Next of Kin of Chambers*, 3 Jones Eq. (N. C.) 253. In the same section, *De Camp v. Dobbins*, 29 N. J. Eq. 36, is cited without any mention of the report of the same case in the Court of Errors, 31 N. J. Eq. 671. The result reached by the lower court was there affirmed, on the ground that the corporation had capacity to take property to the amount in question; but the opinion of BEASLEY, C. J., expresses some views generally regarded as quite divergent from those of the Chancellor in the court below. (See 31 N. J. Eq., pp. 690 to 693; and compare the comments of PECKHAM, J., 19 N. E. Rep., pp. 251 and 254, 255.) Like most other writers on corporations, Judge Thompson appears to have overlooked the interesting early case of *Naylor v. Brown*, Finch, 83, as to the rights of creditors against the property of a dissolved corporation. In Vol. 4, s. 4569, upon the question whether the plaintiff in a stockholder's bill must have been a stockholder at the time of the grievance complained of, no mention is made of *Winsor v. Bailey*, 55 N. H. 218. The "Table of Cases Cited" does not contain either *Tomkinson v. South Eastern R. Co.*, L. R. 35 Ch. D. 675, or *Scarth v. Chadwick*, 14 Jurist, 300, relating to the question whether a stockholder's bill may be

disposed of, against his will, by paying his proportion of the alleged misappropriation (reckoning the proportion according to the number of the plaintiff's shares as compared with the whole number). The case of *Henderson v. Bank of Australia*, L. R. 40 Ch. D. 170, is cited only as to "Notice of Meeting" (Vol. 3, s. 3862), and not as to the power of a corporation to pension the family of a deceased official. There is no citation of *Taunton v. Royal Ins. Co.*, 2 Hem. & Miller, 135, where a dissenting stockholder failed to obtain an injunction restraining the corporation from paying losses not legally collectible under the policy; nor of *Hutton v. West Cork R. Co.*, L. R. 23 Ch. D. 654, where it was held that a company in process of winding up cannot, against the objection of a holder of debenture stock, expend a portion of its funds in gratuities to servants or directors. Nor is there any reference to the cases of *People v. England*, 27 Hun, 139, *In re Greene*, 52 Fed. Rep. 104, p. 119, and *Brundred v. Rice*, 49 Ohio St., p. 650 (s. c., 32 N. E. Rep., p. 172), as to the liability of a stockholder for the crime, tort, or *ultra vires* contract of a corporation. There is no mention of *Northern R. R. v. Concord R. R.*, 50 N. H. 166, where a contract made by a board of directors, near the end of their term, for the purpose of preventing the management of the road from passing into the hands of their successors, was held invalid because of such purpose.

Of course, no one can complain that the book does not contain all the latest authorities up to the very moment of going to press. But it is to be regretted that the Preface, dated January 1, 1895, does not state the precise time to which the authorities are brought down. In the absence of any explanation on this point, some readers may assume that the work gives all important corporation cases appearing in the advance numbers of The West Company Reports during the year 1893. Such an assumption would be erroneous, as may be seen by looking in vain for *Mobile & Ohio R. Co. v. Nicholas*, 12 So. Rep. 723, or *Beitman v. Steiner*, 13 So. Rep. 87.

A few mistakes in proof-reading and verification of references have been noticed. Vol. 5, s. 6428, "burroughs" for boroughs. Vol. 4, s. 4564, "Chief Justice Rolt" for Lord Justice Rolt (as correctly named in s. 4566, note 1). Vol. 1, s. 90, "Chancellor Green" for Chancellor Zabriskie (an error which was probably copied from 90 Am. Dec. 618). In Vol. 1, s. 67, note 1, the celebrated English case of *Natusch v. Irving* is credited to the Tennessee Reports, being cited as found in "2 Coop. Ch. (Tenn.) 358," instead of in 2 Cooper Eng. Chan. Rep., *Tempore Cottenham*, 358 (or, as elsewhere cited by Judge Thompson, in the Appendix to Gow on Partnership).
J. S.

A TREATISE ON THE AMERICAN LAW OF ATTACHMENT AND GARNISHMENT. By Roswell Shinn of the Chicago Bar. Indianapolis: The Bowen-Merrill Company. 1896. 2 vols., pp. xxxi, x, 1623.

The author's aim has been "to state the rules and principles of construction and procedure of what may be termed the American Law of Attachment, including Garnishment," and not "to set out the separate statutory provisions." That this purely statutory branch of the law is susceptible of a general treatment has been demonstrated by Drake and other writers. There can be no doubt that a reliable book of reference is almost indispensable to the modern practitioner. The object of the

author has been to produce a book that can be used as supplementary to the statute of any particular jurisdiction. As far as can be judged by a hasty review, the law is clearly and carefully stated. The questions that may arise from the adoption of the remedy to the final disposition of the case are taken up in order and exhaustively treated, so that the practitioner may comply intelligently with the requirements of his statute. Owing to the treatment of attachment and garnishment in separate volumes, the work is admirably arranged for ready reference. A further aid to reference is the copious index.

E. S.

THE FRENCH LAW OF MARRIAGE. By Edmond Kelly. Second Edition, Revised and Enlarged by Oliver E. Bodington, of the Inner Temple. New York: Baker, Voorhis, & Co. 1895. pp. xvi, 280.

"In no respect does the spirit of French law differ more radically from our own than in relation to marriage." Thus Mr. Kelly begins his book. That the differences between the two systems are very striking, the reader must admit. The curious French rule, which requires a man of any age who is about to marry to solicit the consent of an unwilling parent by the formal petition known as the *acte respectueux*, and which allows the parent to delay the marriage upwards of two years, certainly has no counterpart in our law. Nor have we any provision which charges a father-in-law with the support of an indigent son-in-law (see p. 73), nor any doctrine that promises of marriage are void as trenching on the absolute freedom of choice which should prevail until the actual ceremony (see p. 28). The discussion of these points of difference renders the book very interesting. Its practical value lies in its clear statement of the many difficulties attendant on marriages between French citizens and foreigners, and of the formalities essential to render such marriages valid. The author's work is supplemented by copious selections from the French Code, accompanied by a translation.

R. G. D.

THE NATURE OF THE STATE. By Westel W. Willoughby, Ph. D., Lecturer on Political Philosophy at Johns Hopkins University. New York and London: Macmillan & Co. 1896. pp. xii, 448.

This treatise would more naturally be found on the shelves of an economist than on those of a lawyer, for its aim is the construction of a system of political philosophy. There is, however, an interesting discussion of the origin and nature of law, followed by a chapter on analytical jurisprudence. The author adopts the views of the English analytical school, and, following the theory of Bentham and of Austin, maintains that all law, whether legislative or judicial, is a command of the sovereign. On this line he shows that "not until a principle has been declared by the legislative mouthpiece of the State or judicially accepted by the courts, and the courts' rulings in turn acquiesced in by the ruling authorities, as evidenced by the enforcement thereof, does such a principle become stamped with the quality of law in the Austinian sense." He repudiates the historical view that customary law becomes invested with a legal character by the general recognition of its binding force before its acceptance by the courts. The book is well written, and is sure to be interesting to students of political science.

H. C. L.

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NO. 2.

A BRIEF SURVEY OF EQUITY JURISDICTION.¹

VIII.

REAL OBLIGATIONS.

THE last five articles have been occupied with a consideration of the jurisdiction of equity over personal obligations,² and those articles contain all that it is thought necessary to say, in this brief survey, on that branch of equity jurisdiction.

The next topic to be considered, according to the classification of legal rights stated in the first of this series of articles,³ is that of real obligations. The jurisdiction of equity, however, over this class of legal rights will not, it is hoped, detain us very long.

A real obligation is undoubtedly a legal fiction, *i. e.*, a fiction invented by the law for the promotion of convenience and the advancement of justice. The invention consists primarily in personifying an inanimate thing, and giving it, so far as practicable, the legal qualities of a human being. The invention was originally made by the Romans, and it has been borrowed from them by the nations which have succeeded them. It may be doubted also whether modern nations would have invented the fiction for themselves; for it is less necessary, as well as much less obvious, in mod-

¹ Continued from Vol. V. p. 138.

² Vol. I. p. 355, Vol. II. p. 241, Vol. III. p. 237, Vol. IV. p. 99, Vol. V. p. 101.

³ Vol. I. pp. 55-57.

ern times, than it was when the Roman State was founded. The reason of this will be found in the change which has taken place in respect to the legal consequences of personal obligations. An obligation, according to its true nature, can be enforced only against the person or thing bound by it, and, on the other hand, the person or thing bound by an obligation becomes thereby absolutely subject to the power of the obligee, in case the obligation is not performed; and this was the light in which an obligation was originally regarded by the Romans. Moreover, a personal obligation, *ex vi termini*, binds only the person (*i. e.*, the body) of the obligor or debtor, and has nothing to do with his property. Consequently, by the Roman law, when a personal obligation was broken the obligee or creditor originally had no legal means of procuring satisfaction from the debtor's property; he could compel satisfaction out of the debtor's property only indirectly, namely, by exerting his legal power over the debtor's body. It is plain, however, that the interests of debtors and creditors alike required that a debtor should be able to give a creditor the same rights against the debtor's property, or some portion of it, that a personal obligation gave him against the debtor's body, and no better or more obvious mode of accomplishing this object could be adopted than that of enabling a debtor to impose upon his property an obligation in favor of his creditor, in analogy to the obligation which he imposed upon his person, and accordingly real obligations were invented and came into use. In time, however, though indirectly and by slow degrees, creditors acquired the right, after obtaining judgments upon personal obligations, to have the same satisfied out of the debtor's property, and thus one reason for the existence of real obligations ceased. By still slower degrees, though directly and through the operation of positive law, the rights of creditors against the bodies of their debtors were curtailed, until, at the present moment, they have almost ceased to exist. The result, therefore, is that personal obligations have been so perverted that, while, according to their true nature, they can be enforced only against the persons of the obligors, they can in fact now be enforced for the most part only against their property; and a consequence of this has been, that not only the distinction between personal obligations and real obligations, but the very existence of the latter, as well as the nature and proper legal consequences of obligations generally, have been in great measure lost sight of.

It is a great mistake, however, to suppose that there is no longer any occasion for real obligations, or that they have ceased to exist. On the contrary, many of the reasons for their existence are as strong as they ever were, and accordingly they are still in daily use.

I. Although a creditor, when he has obtained a judgment against his debtor upon a personal obligation, is entitled to have the same satisfied out of the debtor's property, yet a personal obligation of itself gives the creditor no right as against the debtor's property, nor does it at all limit the debtor's power over his property; and consequently it gives a creditor no priority over other creditors of the same debtor. In short, it is only in one event that a personal obligation is a satisfactory security to a creditor, namely, that of the debtor's being solvent, and so remaining till the debt is paid. If, therefore, a creditor wishes to secure the payment of his debt, irrespective of the debtor's solvency, he must obtain some other security than a personal obligation, namely, a security upon property, either of the debtor or of some third person. Moreover, there are only two ways of accomplishing this object; namely, first, by transferring the ownership of the property to the creditor, or to some other person for his benefit; secondly, by creating an obligation upon the property in the creditor's favor. The second of these modes was the one exclusively used by the Romans in the later periods of their history, and is the one, generally at least, used by the modern nations of continental Europe, while in England and with us both are used. The Romans had two ways of creating the obligation, namely, first, by the delivery of the property to the creditor, to be held by him till the debt was paid (*pignus*); secondly, by a mere agreement between the owner of the property and the creditor, the property remaining in the possession of its owner (*hypotheca*). Originally, possession of the property by the creditor was indispensable, and so the *pignus* alone existed; but, at a later period, the parties to the transaction were permitted to choose between a *pignus* and a *hypotheca*. So long as the *pignus* was alone in use, it is obvious that the obligation could be created only by the act of the parties, as they alone could change the possession of the property. But when the step had been taken of permitting the mere agreement of the parties to be substituted for a change of possession, it was another easy step for the law, whenever it saw fit, to substitute its own will for the agreement of the parties; and hence hypothecations came to be divisible into such

as were created by the acts of the parties (conventional hypothecations) and such as were created by the act of the law (legal or tacit hypothecations). Again, so long as a change of possession was indispensable, it is plain that the obligation could attach only upon property which was perfectly identified, and that there could be no change in the property subject to the obligation, except by a new change of possession. But when a change of possession had been dispensed with, and particularly when legal or tacit hypothecations had been introduced, it became perfectly feasible to make the obligation attach upon all property, or all property of a certain description, either then belonging to the debtor or afterward acquired by him, or upon all property, or all property of a certain description, belonging to the debtor, for the time being; and hence hypothecations came to be divided into those which were special and those which were general.

Except in the particulars just stated, there was no difference between the *pignus* and the *hypotheca*. Each was alike a real obligation; and if, as generally happened, the debt was created by a personal obligation, the latter was the principal obligation, while the former was merely accessory, collateral, or incidental to the latter; and hence, whenever the principal obligation was extinguished, the accessory obligation fell with it; and this explains the fact that payment of the debt extinguished the creditor's rights in the property pignored or hypothecated to him. Moreover, if the property belonged to some other person than the debtor, the real obligation was regarded as an obligation of suretyship, the property being regarded as a real surety for the debt, just as its owner would have been a personal surety, if he had incurred a personal obligation of suretyship; and hence the owner of the property had the same rights of subrogation, whether his property was a real surety, or he himself was a personal surety, for the debt.

If the debt was not paid when it became due, the creditor's remedy upon the real obligation against the property was closely analogous to his remedy upon the debtor's personal obligation against the debtor's body, *i. e.*, he was entitled to proceed against the property judicially, and have it condemned and sold for the payment of the debt.

The Roman law in respect to the *pignus* has been a part of the English law, under the name of pawn or pledge, from time immemorial, so far as it is applicable to movable property, and it has never undergone any material change, either in England or in this

country. As to immovable property, however, it has never been admitted, *i. e.*, it has never been possible, either in England or in this country, to impose an obligation upon land in favor of a creditor by simply placing the latter in possession of it.

The Roman hypothecation has been admitted into the admiralty law of all modern nations, so far as the limited jurisdiction of admiralty has rendered its admission practicable; but it has been rejected by the English common law, except in those cases in which it is created by the law itself. What are such excepted cases? First, when the debt is created by judgment or other matter of record, the creditor has a general hypothecation upon all land belonging to the debtor when the debt is created, or which is afterwards acquired by him; secondly, when the law permits a plaintiff, on bringing an action, to attach property, such plaintiff has a special hypothecation upon the property actually attached; thirdly, by the law of England, and of many of our States, all movable property found upon leased land when rent becomes due, is hypothecated to the landlord to secure the payment of such rent.

There is also a class of cases in our law in which debts are secured by movable property belonging to the debtor, and which have some of the characteristics of pledges, and some of the characteristics of hypothecations, but as to which it is doubtful whether they can be classed as either the one or the other, namely, cases in which the debts have been created by the performance of services by the creditor on the articles which furnish the security for the debts, and which articles have come into the possession of the creditor for the purpose of his performing such services upon them. The right of the creditor in all such cases is called a lien, and there is no doubt that all such liens are instances of real obligations. Indeed, the constant use by English and American lawyers of the word "lien" to designate the right of the creditor in these and other cases of real obligations ought to have been a reminder to them that there are such things as real obligations.

What are the remedies afforded by our law in cases of pledges, hypothecations, and liens, and to what extent, if at all, does equity assume jurisdiction over them? In cases of hypothecations which come within the jurisdiction of admiralty, courts of admiralty afford the same remedy that was afforded by the Roman law, and in such cases equity has no occasion to interfere. In cases of pledge, our law affords no judicial remedy whatever, though our courts of law hold that a pledgee has a power by implication, if the debt is not

paid when it becomes due, to sell the pledge on giving due notice to the pledgor;¹ and this remedy sufficiently answers the needs of the pledgee in the great majority of cases.² In cases of liens, not only does our law afford the creditor no judicial remedy, but our courts hold that he has no power of sale;³ and thus there is held to be an important difference between pledges and liens; nor will this be a cause for surprise when it is remembered that pledges are always made by the owners of the property pledged, while liens are created by the law alone, and that the implied power of sale, in the case of a pledge, is given by the pledgor. In the case of common law hypothecations, all of which, as has been seen, are created by the law alone, the same law which creates them also provides one or more remedies for their enforcement, and these remedies have, except under special circumstances,⁴ been found sufficient.

Will equity afford a remedy in the case of pledges or liens, either to the creditor or the owner of the property, when a judicial remedy is necessary? In respect to the creditor, it should be premised that, in all cases where a creditor has real security for the payment of his debt, whether his title to such security be legal or equitable, and whether it consists of ownership of the property which constitutes the security, or of an obligation upon it, equity, if it enforces the security at all, has one uniform mode of doing so, unless (as in the case of ordinary mortgages) such a mode of enforcing the security is thought to be excluded by the agreement of the parties, namely, the Roman mode of directing a sale of the property, and a payment of the debt out of the proceeds of the sale. Moreover, this is precisely the mode of enforcing the security which is called for by every consideration of justice and convenience in the case of pledges and liens. It would seem to be a case, therefore, in which there is a legal right without any legal remedy, and in which equity has a remedy which is perfect as well as easy; and therefore equity should afford such remedy, unless a power of sale in the creditor be thought to render a judicial sale unnecessary, or the amount involved be too small to warrant the interference of equity.

¹ *Pigot v. Cubley*, 15 C. B., n. s. 701.

² This is evident from the dearth of direct authority upon the subject of judicial sales, under decrees in equity, at the suit of pledgees. See *infra*, p. 77, n. 1.

³ *Doane v. Russell*, 3 Gray, 382; *Briggs v. B. & L. R. Co.*, 6 Allen, 252; *Busfield v. Wheeler*, 14 Allen, 139, 143.

⁴ For an instance in which equity will direct a sale of land to satisfy a lien thereon by judgment or recognizance, see Vol. IV. pp. 125, 126.

Upon authority, the question must be answered in the affirmative in respect to pledges,¹ but in the negative in respect to liens,² though there seems to be no good reason for such a distinction.

There is not likely to be any occasion for equity to interfere in favor of the owner of the property, in cases of pledges or liens, unless there is a controversy between him and the creditor as to the amount of the debt; for, if there be none, the former should pay the debt, and then he can recover the property at law. If there is such a controversy, however, or if for any reason the creditor refuses to accept payment, the owner of the property is entitled to file a bill to have the amount of the debt ascertained and declared, and to have the property restored to him on his paying or tendering such amount.³ In the case of ordinary mortgages, indeed, a tender has the same effect as actual payment, so far as regards the mortgaged property. If made on the day named in the mortgage deed, either payment or tender will divest the title of the mortgagee, and re-vest the title of the mortgagor, while, if made after that day, neither will have any legal effect upon the title to the mortgaged property; and the reason is that a mortgage is a conveyance of the legal title to the mortgagee, subject to its re-vesting in the mortgagor on performance by him of a condition subsequent, namely, making payment of the debt on the day named, and only in that event; and, though actual payment alone will be a performance of that condition, yet a tender and refusal will be a good excuse for non-performance, and so will have the same effect as performance.⁴ In the case of a pledge or lien, however, while

¹ There are numberless *dicta* to the effect stated in the text, and that such is the law there can be no doubt; and yet, strange as it may seem, the writer has not found a single authority directly in point. Kent says (2 Com. 582) the pawnee "may file a bill in chancery, and have a judicial sale under a regular decree of foreclosure; and this has frequently been done in the case of stock, bonds, plate, and other chattels, pledged for the payment of debt." All the cases which he cites, however, are cases of bills by pledgors to redeem the property pledged.

² *T. I. W. & S. Co., Lim., v. P. D. Co., Lim.*, 29 L. J. Ch. 714. Though the decision in this case is in point, the reason given for it is so extraordinary (namely, that the lien did not confer upon the creditor a power of sale), that it ought not, it seems, to be regarded as settling the question. Presumably, it was because the creditor could not make a sale by his own authority that he applied to the court for a judicial sale.

³ *Demandray v. Metcalf*, Ch. Prec. 419; *Kemp v. Westbrook*, 1 Ves. 278; *Vanderzee v. Willis*, 3 Bro. C. C. 21.

⁴ "If A borroweth 100 £ of B, and after mortgageth land to B, upon condition for payment thereof: if A tender the money to B, and he refuseth it, A may enter into the land, and the land is freed forever of the condition, but yet the debt remaineth, and may be recovered by action of debt." Co. Litt. 209 b.

the creditor never has any more than an obligation on the property, yet that obligation is an absolute and unqualified obligation to pay the debt, and hence nothing short of an actual extinguishment of the debt can release the property; and a tender and refusal, so far from extinguishing the debt, leaves it still due and payable.¹

A pledge, hypothecation, or lien, as has been seen, is generally accessory, collateral, or incidental to a personal obligation by which the debt is created, and which therefore constitutes the principal obligation. A real obligation may, however, itself create a debt and so be a principal obligation; and, in that case, if there be also a personal obligation on the part of the owner of the property to pay the debt, the latter will be merely accessory to the real obligation. There are in English law two real obligations in particular which are always principal obligations, namely, rent and predial tithe. In each of these, the property bound is land; and yet in each it is not the *corpus* of the land, but its fruits, or the income produced by it, that is bound. Each, therefore, according to the nomenclature of the law of Scotland, is a *debitum fructuum*, — not a *debitum fundi*. Hence, each is payable periodically; and hence also, when a payment becomes due, it becomes a personal obligation of the occupier of the land, who has received the fruits out of which the rent or tithe in question was payable. The right to receive either rent or tithe in future is real estate, and is transferable, and, upon the death of its owner, it goes to his heir in the case of rent, and to his successor in the case of tithe; but the moment that a payment becomes due, its character changes, and it becomes personal estate and a *chose en action*, and consequently is not assignable, and on the death of its owner it goes to his executor or administrator. Hence, when an owner of rent or of tithe dies, his right to receive future payments goes in one direction, while the right to receive any payments that may be in arrear goes in another direction.

Rent is created by the act of the owner of the land out of which the rent issues. The act by which a rent is created is either a reservation or a grant. A rent is created by a reservation when the owner of land grants it to another person for years, for life, in tail,

¹ See preceding note. To be sure, if the creditor sue the debtor for the debt, the latter may plead the tender and refusal, but, to make his plea good, he must also allege that he has always been and still is ready and willing to pay the money so tendered, and he must bring the same into court, ready to be paid to the plaintiff, if he will accept it.

or in fee, reserving to himself a rent out of the same, the estate in the rent reserved being generally of the same duration as that granted in the land. A rent is created by grant when the owner of land grants a rent out of the same to another person for years, for life, in tail, or in fee.

At common law, there was a sharp line of demarcation between a rent reserved and a rent granted. 1. Every ordinary grant of land at common law created between the grantor and the grantee the feudal relation of lord and tenant, the latter holding the land from the former, and the former having a reversion, or at least a feudal seignior, in the land; and hence every rent reserved upon such a grant was a rent payable by a feudal tenant to his feudal lord. 2. Though the parties to that relation were liable at any time to change, yet the relation itself was permanent, *i. e.*, as permanent as the estate granted in the land. 3. The rent was in the nature of a feudal service, to be rendered by the tenant as such to the lord as such; and hence it was necessary, not only that the obligation to pay the rent should follow the land into the hands of any new tenant (which it of course would do, the land being the debtor), but that the right to receive the rent should follow the reversion or seignior into the hands of any new lord; and this latter object the law accomplished by annexing the right to receive the rent to the reversion or seignior as an incident or accessory. In short, as the obligation to pay a rent reserved always followed the land out of which it issued, so the right to receive it always followed the reversion or seignior to which it was annexed. It is true that the lord might at any time sever the rent from the reversion or seignior by granting away either and retaining the other, or by granting away each to a different person; but by so doing he changed the nature of the rent from that of a rent reserved to that of a rent granted. 4. A right to distrain was a legal incident of every feudal service, and therefore of every rent which was in the nature of a feudal service. 5. As land could be conveyed at common law, even in fee, without a deed (*i. e.*, by livery of seisin), so, on a conveyance of land, a rent could be reserved, even in fee, without a deed.

A grant of a rent, on the other hand, neither created nor accompanied any relation between the grantor and the grantee; it simply created the relation of obligor and obligee between the land out of which the rent was to issue and the grantee of the rent. The relation of the latter to the land was simply that of a creditor, holding

the land as security for the payment of his debt. He had, therefore, no right to distrain, unless such a right was expressly given in the grant. Moreover, a rent could be granted only by deed.

Such were the distinctions between a rent reserved and a rent granted at common law. An anomaly was, however, introduced by the statute of *Quia Emptores*; ¹ for it was a consequence of that statute that a grant of land in fee no longer created the relation of lord and tenant between the grantor and the grantee, nor left any reversion or seigniorship in the grantor, but operated simply as an assignment of the grantor's tenancy to the grantee; in short, that such a grant created no new feudal relation, but simply changed one of the parties to an old one. It was still possible, notwithstanding the statute, upon a grant of land in fee, for the grantor to reserve a rent, but the nature of a rent so reserved was changed by the statute to that of a rent granted. Indeed, a grant of land in fee, reserving a rent, has had, since the statute, the same effect that two grants would have, namely, a grant of the land, and then a grant of the rent by the grantee of the land.

The payment of either a rent reserved or a rent granted may be secured by the personal covenant of the grantee of the land in the one case, and of the grantor of the rent in the other, and a rent reserved commonly is so secured. Such a covenant, as has been seen, is accessory to the obligation of the land, which is the principal obligation.

In order to understand to what extent it may be necessary for equity to assume jurisdiction over rents, it is necessary first to ascertain what remedies the law provides for the recovery of rents, and to what extent such remedies are available and adequate.

1. At common law, whenever any person to whom a freehold rent was payable had become seised of it, and was afterwards dis-seised, he was entitled to bring a writ of assize to recover it; but that remedy was never applicable to a rent reserved on a lease for years, or to a rent granted for a term of years, and the remedy itself no longer exists.

2. Upon a rent granted, a writ of annuity would lie at common law to compel its payment, but not upon a rent reserved. The reason why that writ would lie upon a rent granted was that a grant of a rent differed from a grant of an annuity only in being something more, and hence every grant of a rent amounted to the

¹ 18 Edw. I. Stat. 1, c. 1.

grant of an annuity, on the principle that *omne majus in se minus continet*. For the same reason, if a grant of a rent failed as such, *e. g.*, because the grantor had no title to the land out of which the rent was to issue, yet the grant might be good as a grant of an annuity. The same grant could not, however, operate both as a grant of a rent and as a grant of an annuity; and while, therefore, the grantee of a rent always had the option of treating the grant as the grant of an annuity, yet, if he once elected so to treat it, he could not afterwards treat it as a rent. Moreover, as an annuity was a personal obligation, while a rent was a real obligation, a consequence of an election by the grantee of a rent to treat the grant as a grant of an annuity was that the land was discharged, and the grantee had to look to the personal liability of the grantor alone.

From what has been said, the reason is obvious why a writ of annuity would never lie upon a rent reserved; for, as a reservation of a rent is the act of the grantor of the land alone, it would be absurd to say that it can operate as a grant of an annuity by the grantee of the land; and yet it must so operate if a writ of annuity is to lie for recovering it. It would be equally absurd to say that the grantor of the land can by his own act impose a personal obligation upon the grantee of the land.

A writ of annuity, however, like a writ of assize, has ceased to be an available remedy.

3. If the grantee of land, upon the grant to whom a rent is reserved, or the grantor of a rent, covenant to pay the rent, of course the covenantee can sue upon the covenant, if the rent is not paid. The value of such a covenant, however, in case of a rent granted, or in case of a rent reserved upon a grant of land in fee, depends much upon the question whether the covenant runs with the land, — a question which will be considered hereafter.¹

4. An action of debt would always lie for the recovery of rent, either against the grantee of land, on the grant to whom the rent was reserved, or against the grantor of a rent, or against the assignee of either, so long as he held the land as such assignee. In the case, however, of a freehold rent, this action was of little value, as it would not lie until the last payment of the rent became due.

5. The remedy by way of distress was available in all cases of

¹ See *Van Rensselaer v. Hays*, 19 N. Y. 68.

rents reserved, except where (since the statute of *Quia Emptores*) the reservation was upon a grant of the land in fee, and in all cases of rents granted, and of rents reserved upon grants of land in fee, provided a right to distrain was expressly given.

6. In all cases of rents reserved, even upon grants of land in fee, the estate granted could be made to depend, by means of a condition subsequent, upon payment of the rent, *i. e.*, it could be provided that, in case of failure to pay the rent, the estate of the grantee in the land should cease, and the title to the land revert in the grantor. This remedy was of less value, however, than at first sight it seems to be; for, 1st, the grantor could recover possession of the land, against the will of the grantee, only by an action of ejectment; 2dly, as such a condition worked a forfeiture of the grant, it was regarded by the law with disfavor, and hence the enforcement of it was surrounded by so many difficulties that it became well-nigh impracticable;¹ 3dly, at any time before the grantee was actually dispossessed of the land, he could obtain from a court of equity an injunction against any further proceedings at law, on paying the rent in arrear, with interest and costs; and, 4thly, even after he was dispossessed by means of an action of ejectment, a court of equity would not only restore him to the possession at any time on the terms just stated, but require the grantor to account rigorously for the rents and profits during all the time that he had held the possession.² Moreover, such a condition could never be made in case of a rent granted, as there was in that case no grant of the land to which the condition could be annexed.

7. A grantor of a rent,³ however, as well as a grantor of land,

¹ *Duppa v. Mayo*, 1 Wms. Saund. 282, 287, n. 16. In *Jackson v. Harrison*, 17 Johns. 66, which was an action of ejectment by a landlord against a tenant to enforce a forfeiture for non-payment of rent, the plaintiff was defeated because he demanded the rent in the afternoon of the day on which it became due, instead of demanding it just before sunset.

² The statute of 4 Geo. II. c. 28, s. 2, contains the following recital: "Whereas great inconveniences do frequently happen to lessors and landlords, in cases of re-entry for non-payment of rent, by reason of the many niceties that attend re-entries at common law; and for as much as, when a legal re-entry is made, the landlord or lessor must be at the expense, charge, and delay of recovering in ejectment before he can obtain the actual possession of the demised premises; and it often happens that, after such re-entry made, the lessee or his assignee, upon one or more bills filed in the court of equity, not only holds out the lessor or landlord by an injunction from recovering the possession, but likewise, pending the said suit, do run much more in arrear, without giving any security for the rents due, when the said re-entry was made, or which shall or do afterwards incur."

³ *Jemott v. Cowley*, 1 Wms. Saund. 112.

reserving a rent,¹ could couple with the grant or the reservation of the rent a grant or reservation of the right, in case of failure to pay the rent, to enter upon the land, and retain possession of it until, by receipt of the rents and profits, all arrears of the rent were paid; and, by virtue of this right, the grantee of the rent, or the grantor of the land, or the assignee of either, could recover possession of the land by ejectment. Moreover, as such a right did not operate by way of forfeiture, of course a court of equity would not interfere with its exercise. If, however, the right granted or reserved was to enter upon the land, and take the rents and profits thereof *to his own use*, until all arrears of rent were paid by the grantor of the rent or the grantee of the land, the right would operate by way of forfeiture, — not indeed of the land, but of its rents and profits between the time of entry and the time of payment of the arrears of rent; and hence equity would relieve against the forfeiture.² Such was understood by Littleton to be the nature of the right in the case put by him in section 327 of his *Tenures*.³

It may be added that, at common law, an assignee of a rent, whether it were a rent created by reservation or by grant, was not entitled to any of the foregoing remedies, until the tenant or owner of the land had attorned to him. The necessity of attornment was, however, long since abolished.

Of the seven remedies enumerated above, the first and second, as has been seen, no longer exist; the third and fourth are merely personal remedies, — not remedies against the land, — and for that reason alone are entirely inadequate, being of little value except against a solvent defendant; the fifth is a remedy, not against the land bound for the rent, but against movable property found on the land; the sixth is a remedy against the land, not by way of obtaining payment of the rent, but by way of forfeiture for its non-

¹ "Where a feoffment is made of certain lands, reserving a certain rent, etc., upon such condition, that, if the rent be behind, it shall be lawful for the feoffor and his heirs to enter, and to hold the land until he be satisfied or paid the rent behind, etc., in this case, if the rent be behind, and the feoffor and his heirs enter, the feoffee is not altogether excluded from this, but the feoffor shall have and hold the land, and thereof take the profits, until he be satisfied of the rent behind; and when he is satisfied, then may the feoffee re-enter into the same land, and hold it as he held it before. For in this case, the feoffor shall have the land — but in manner as for a distress, until he be satisfied of the rent, etc., though he take the profits in the mean time to his own use," etc. Litt., s. 327. "The case of Littleton cannot be maintained by reason, but only by the authority of the author." *Per* Kelyng, J., in *Jemott v. Cowley*, T. Raym. 136.

² Co. Litt. 203, and Butler's note.

³ *Supra*, note 1.

payment; and the seventh is a remedy against the land, as a means of obtaining payment of the rent. The last remedy, however, is one which is seldom provided for, and with which few persons are familiar. It is a remedy too which can be enforced only by an action of ejectment, and which will eventually involve an accounting in equity by the person who avails himself of it, unless the parties can agree; and it cannot therefore be deemed a very satisfactory remedy.

That none of the foregoing remedies have been regarded as fully adequate is evident from the legislation which has been enacted, both in England and in this country, upon the subject of remedies for the recovery of rents. The aim of such legislation has been materially different, however, in the two countries. In England, legislation has been directed mainly to the improvement of two of the old remedies, namely, that by way of distress, and that by way of forfeiture. The former of these remedies seems always to have been the favorite one in England, as well with the Legislature as with landlords, and the constant aim has been to render it more efficient and available.¹ The remedy by way of forfeiture has also been materially improved in England, in the interest of landlords, by rendering its prosecution less difficult, by requiring tenants, as a condition of obtaining an injunction, to pay all arrears of rent into court, thus removing from them the temptation to resort to equity for the mere purpose of delay, and by disabling tenants from resorting to equity, except within six months after they are dispossessed.²

In this country, on the other hand, the remedy by way of distress has not generally been regarded with favor; tenants have claimed that it savored of feudal bondage and oppression; the public have claimed that it favored one class of creditors at the expense of all others; in some of our States it has never existed; in others it has been abolished; and it is believed that the ten-

¹ See 17 Car. II. c. 7 (reciting that "the ordinary remedy for arrearages of rents is by distress upon the lands chargeable therewith; and yet nevertheless by reason of the intricate and dilatory proceedings upon replevins that remedy is become ineffectual"); 2 Wm. & M. c. 5 (reciting that "the most ordinary and ready way for recovery of arrears of rent is by distress"); 8 Anne, c. 14; 4 Geo. II. c. 28, s. 5 (reciting that "the remedy for recovering rents seck, rents of assize, and chief rents, are tedious and difficult," and enacting that owners of rents seck, rents of assize, and chief rents shall have the like remedy by distress as owners of rents reserved upon leases); 11 Geo. II. c. 19, ss. 1-10, 19-23.

² 4 Geo. II. c. 28, ss. 2, 3, 4.

dency is to abolish it in those States in which it now exists.¹ At the same time, there has been a tendency in this country not to regard a re-entry by a landlord for non-payment of rent as a forfeiture, but rather as a rightful termination by him of the relation existing between himself and the tenant for the default of the latter; and a justification of this tendency may be found in the fact that the only rents with which people have hitherto been familiar in this country are those which are reserved upon leases for short terms, — which constitute the only recompense made by the tenant to the landlord for the land, — and which consequently generally represent the full value of the use of the land. Hence, it has been the general aim of legislation in this country to convert the landlord's remedy by way of re-entry into a universal remedy for non-payment of rent, 1st, by providing very summary and inexpensive proceedings for its enforcement; 2dly, by treating the re-entry and resumption of possession by the landlord, not as a forfeiture, but as a statutory termination of the lease, and therefore making such resumed possession unimpeachable in equity; 3dly, by giving every landlord a right of re-entry for non-payment of rent, whether any condition of re-entry be inserted in the lease or not.² It is believed, moreover, that the remedy thus provided

¹ Lord Kames (Historical Law Tracts, 4th ed., pp. 169, 170), writing about the middle of the last century, said: "In the infancy of government, shorter methods are indulged to come at right than afterward when, under a government long settled, the obstinacy and ferocity of men are subdued, and ready obedience is paid to established laws and customs. By the Roman law, a creditor could sell his pledge at short hand. With us, of old, a creditor could even take a pledge at short hand, and, which was worse than either, it was lawful for a man to take revenge at his own hand for injuries done him. None of these things, it is presumed, are permitted at present in any civilized country, England excepted, where the ancient privilege of forcing payment at short hand, competent to the landlord, and to the creditor of a rent charge, is still in force." In *Farley v. Craig*, 15 N. J. 191, 213, Ford, J. (sitting in a State in which landlords have always been entitled to distrain for non-payment of rent), said: "By distraining, a man carves out justice, without judge or jury, for himself; and it is well enough to have the option; but no prudent man would use it without a great emergency, — much less have such an odious measure forced on him as his only remedy. It is always harsh; the blow comes without a word, on the tenant's property, like a bolt from the sky. It is the tiger's process in hunger. Tenants commonly elude it if they can by fraud or guile, and sometimes resist it by direct violence, such as it seems was preconcerted in this case, and in full readiness, if a distress had been attempted."

² The legislation referred to in the text had its origin in the English statute of 11 Geo. II. c. 19, s. 16, which (after reciting that "landlords are often great sufferers by tenants running away in arrear, and not only suffering the demised premises to lie uncultivated without any distress thereon, whereby their landlords or lessors might be satisfied for the rent arrear, but also refusing to deliver up the possession of the

is now more resorted to than all other remedies put together, especially in those States where a right to distrain for non-payment of rent does not exist.

Such being the remedies furnished by courts of law for the non-payment of rent, the question arises whether they are available and adequate in all cases that can happen. In answering this question, it will be convenient to distinguish rents into three classes, with reference to the different purposes for which they may be created.

First, when an ordinary lease is made, reserving a rent, the object of the lessor is simply to obtain an income from property which he does not wish himself to occupy, *i. e.*, from property which he holds as an investment, while the object of the lessee is to obtain the possession and enjoyment of property which he is unable to own, or which he does not wish to own.

Secondly, when land, instead of being sold for a sum in gross, is granted in fee, or for a long term of years, with a reservation of an annual rent, such rent constituting the price to be paid for the land, the object of the grantor is to convert his land into another kind of investment, — an investment which will be as permanent as land and much more secure, which will produce a fixed amount of income, and which will cost its owner the least possible care, anxiety, and trouble. An owner of land, moreover, may not be able to sell it for a sum in gross, except at a great sacrifice, and therefore, unless he submit to such sacrifice, he may have to choose between holding the land indefinitely and disposing of it in the manner just indicated, *i. e.*, between making the land produce a regular income, and suffering it to cause a regular outgo. The object of the grantee, on the other hand, is to obtain the land on credit, either because he is unable to pay for it at once, or because he thinks he can put his money to a better use than that of paying for the land. Moreover, if he obtains the land with a view

demised premises, whereby the landlords are put to the expense and delay of recovery in ejectment") provides that two or more justices of the peace may put landlords in possession of leased land in a summary manner, (a) where the rent is a rack-rent, or a rent of full three fourths of the yearly value of the premises; (b) where a year's rent is in arrear; (c) where the tenant has deserted the premises, and left the same uncultivated or unoccupied, so as no sufficient distress can be had to countervail the arrears of rent; and (d) where by the terms of the lease the landlord is entitled to re-enter for non-payment of rent (*Pilton, Ex parte*, 1 B. & Ald. 369); and that, upon the landlord's being so put in possession, the lease shall become void. By 57 Geo. III. c. 52, the foregoing statute was extended to cases where only one half a year's rent was in arrear, and where the landlord had no right to re-enter.

to improving it, and thus increasing its value, a perpetual ground rent ought to answer his purpose much better than a mortgage; for, (*a*), a mortgagor incurs the constant or oft-recurring liability of being called upon to pay the principal; (*b*), the negotiation of every new mortgage loan is attended with a considerable expense; (*c*), so great is now the desire for permanent and secure investments, which will produce a fixed income, that a well secured perpetual ground rent of one thousand dollars (*e.g.*) ought materially to exceed in value any sum of money that can be borrowed temporarily at an interest of one thousand dollars per annum.

Thirdly, when a rent is granted, without any grant of the land out of which the rent is to issue, the object of the grantor is to raise money on the security of the land; and he grants a rent, instead of giving a mortgage, because he thinks he can thus obtain better terms in respect either to the rate of interest or to the mode of payment. The mode of payment in particular, namely, by uniform annual instalments, may be an attraction to him, especially if the instalments are liable to cease at any moment by the dropping of a life. It is the object of the grantee, however, that is the chief cause of the transaction's taking the shape it does; for he wishes to convert a sum of money which he has in hand into an annuity, commonly for his own life, and thus to increase his annual income by sinking his principal. In such a transaction, it is obvious that security should be the prime consideration with the grantee; for, on the one hand, he parts with the price of the annuity immediately, while, on the other hand, he has to trust the grantor during the whole period that the annuity is to run; and in many cases the annuity will constitute the grantee's only means of livelihood. If, therefore, the annuity takes the shape of a grant of a rent, that is merely for the sake of security; and hence it is a mere accident. The essence of the transaction is an agreement to pay a fixed sum annually, for the period of time agreed upon, in consideration of a sum in gross paid immediately.

For non-payment of rents of the first class, the remedies provided by law seem to be all that can be asked for, especially in places where the remedy by distress is given, in addition to the other remedies before enumerated; and even where that remedy is withheld, a landlord who can summarily dispossess a tenant who fails to pay his rent has not much to complain of. If it be said that this is no remedy for rent already due, it may be answered, 1st, that indirectly it is a very powerful remedy; 2dly, that

no court can give an effective remedy for an unsecured debt against a debtor with no assets. If, indeed, the tenant does not pay for the land entirely by an annual rent, but partly by a rent and partly by a fine (*i. e.*, a sum in gross paid at the commencement of the lease), — a thing which is very common in England,¹ though very uncommon in this country, — a difficulty arises; for in such a case, if the law permits the tenant to be summarily dispossessed for non-payment of rent, and disables him from seeking relief in equity, it is unjust to the tenant, as he in truth loses his lease by way of forfeiture; and, on the other hand, if the law does justice to the tenant, it deprives the landlord of his summary remedy. In this latter case, therefore, equity may be called upon to interfere in the landlord's favor, especially in places where he is not allowed to distrain.

The cases in which reservations of rents of the second class will be found desirable are chiefly those in which vacant land in or near cities and large towns is granted for the purpose of being built upon. In such cases, grants of land in consideration of rents reserved will be likely to promote the interests, not only of the parties to the transaction, but of the public as well, and therefore they should receive all the support and encouragement that the law can afford them.

The practice of granting land in fee for building purposes, in consideration of a rent reserved, has never, it is believed, prevailed in England to any great extent;² nor has it in our States, with the exception of Pennsylvania. In that State, however, as well as in Scotland, this practice has prevailed, and still prevails very extensively. It is a significant fact, however, that in Pennsylvania the statute of *Quia Emptores* has never been in force,³ and that no similar law has ever existed in Scotland.⁴

The practice, however, of leasing land (generally for terms of considerable length and with provisions for renewal) for building purposes has prevailed extensively in England and in New York, and probably also in other parts of this country.

Does the law afford adequate remedies for the recovery of rents

¹ Compare note 2, pp. 85, 86.

² Instances of such grants will be found, however, in *Milnes v. Branh*, 5 M. & S. 411; *Apsden v. Seddon*, 1 Ex. D. 496; *Haywood v. Brunswick Building Society*, 8 Q. B. D. 403.

³ *Ingersoll v. Sergeant*, 1 Whart. 337.

⁴ See *Clark v. Glasgow Assurance Co.*, 1 McQ. 668.

reserved upon grants of land in fee for building purposes, or upon building leases, so that the interference of equity will not be necessary? In England, as has been seen,¹ the remedy by distress always exists for the non-payment of rent of any kind, and is the remedy generally resorted to; and where a sufficient distress can be found, it seems to be clearly adequate; but where no sufficient distress can be found, it seems to be equally clear that the mere existence of a right to distrain ought not to prevent the interference of equity. Does the law of England afford any other adequate remedy in the cases now under consideration? It seems not. The only other remedies which can be claimed to be adequate are the sixth and seventh of those already enumerated: but as each of these is slow, and as each of them is likely to be followed by a suit in equity by the rent-payer, the rent-owner ought to be permitted to resort to equity in the first instance. In this country also it seems equally clear that there is no adequate legal remedy, unless the remedy by distress exists, and there be a sufficient distress, or unless the rent-owner have a summary remedy for the recovery of the land itself. Moreover, this latter remedy does not exist where there is no relation of landlord and tenant, and therefore it does not exist (unless in Pennsylvania) where a rent is reserved upon a grant of land in fee; and it ought not to exist in any case of a building lease, as it will have the effect of depriving the tenant definitively of all his interest in the land by way of penalty and forfeiture, and will thus not only work a great injustice to such tenant, but also an injury to the public by discouraging the acceptance of such leases.

Life annuities are likely to be a favorite form of investment wherever money is plenty and the rate of interest low; but where money is scarce, and the rate of interest is high, they are likely to be in little vogue. Accordingly, they have always been in extensive use in England, while in this country, until within a very recent date, they have been almost unknown. In the future, however, they are likely to be as much in favor here as in England.

When such annuities are granted in the form of rents, the question of equity's assuming jurisdiction over them is substantially the same in England as in the class of cases last considered. In modern times, however, when annuities are granted in England, special provisions are generally made in each case for their security;² and

¹ *Supra*, p. 84, n. 1.

² See Lumley on Annuities, p. 214.

therefore, when equity is applied to by an annuitant, it is seldom on the mere ground that the annuity constitutes a rent. In this country, the purchase and sale of annuities is never likely to be the subject of special bargains between private persons; but the granting of annuities is likely to be confined to companies organized for that purpose (among others), and such companies publish the terms on which they will grant annuities, and these terms are uniform, and hence the granting of an annuity will never be the subject of a special bargain; and every annuity will be granted on the personal credit alone of the company granting it. In short, an annuity is never likely in this country to take the form of a rent. Indeed, the practice of granting rents is believed never to have existed, to any appreciable extent, in this country; and it is not likely to exist in the future.

Returning now to the general question of the jurisdiction of equity over rents, it may be said with confidence that the owner of a rent of any kind is entitled to have the same paid, if the income of the land out of which it issues is sufficient to pay it, and that it does not lie in the mouth of the tenant of the land to say that the income is insufficient. It may be asked, therefore, why every owner of a rent is not entitled to invoke the aid of equity as of course upon showing that his rent is in arrear; and it may be answered, first, that the law of England has shown a full appreciation of the claims of rent-owners by providing them with an extraordinary and exclusive remedy, — one, too, which they can themselves enforce without the aid of any court, — and by protecting that remedy carefully as well against the frauds of tenants as against the competing claims of other creditors, — namely, that of distress; and that it is the clear policy of that law to require rent-owners to exhaust the remedy thus provided before seeking a more specific one against the income of the land; and that, while the law of such of our States as still retain the remedy of distress is much less pronounced in its favor than the law of England, yet it would be clearly against the policy of the law in all such States for equity to interfere in favor of rent-owners before the remedy by distress has been exhausted. Secondly, that in most of our States, as has been seen, landlords can terminate, in a summary manner, their relations with tenants who fail to pay their rents, and that a rent-owner who has that power cannot invoke the aid of equity, since the law gives him all that equity can give him, and even more. Where, however,

the right to distrain is not given, or where that remedy has been exhausted and still the rent is in arrear, and where the rent-owner is not entitled by summary proceedings to recover possession of the land out of which the rent issues, and that too by a title unimpeachable at law or in equity, it seems clear that he is entitled to the aid of equity, for the purpose of securing the application of the net income of the land to the payment of the rent.

It remains to call the reader's attention briefly to the authorities upon the subject of the jurisdiction of equity over rents. Equity began to interfere in favor of rent-owners as early as the reign of Elizabeth, and the time of Lord Chancellor Ellesmere. At first, however, it confined its interference to the cases in which there was some obstacle (which equity regarded as technical and unsubstantial) in the way of a legal remedy. Thus, in *Web v. Web*¹ (42 Eliz.), where a rent was given by will, without any right to distrain, or any right to enter for non-payment, and the devisee had not been able to obtain seisin, and consequently could neither have a writ of assize, nor a writ of annuity, nor an action of covenant, nor an action of debt (as the rent was undoubtedly for the life of the devisee at least), nor distrain, nor enter upon the land, it was decreed that the tenant of the land pay the rent, notwithstanding the want of seisin in the devisee. So in *Ferris v. Tanner*² (44 Eliz.), which presented substantially the same facts, the plaintiff was relieved, though it is not clear what was the relief given. According to one book, the defendant was simply decreed to give seisin to the plaintiff. The further fact is stated that the devisee of the land promised the testator to pay the rent, and thus prevented his taking other means of securing its payment; and this latter fact was regarded as strengthening the case in point of jurisdiction. Again, in *Shute v. Mallory*³ (5 Jac. I.), where a lessor had assigned his reversion to the plaintiff, and the lessee (the defendant) refused to attorn, Lord Chancellor Ellesmere decreed him to attorn, and to pay the rent. In the foregoing cases, however, it is to be observed that the bill was not founded directly upon the ownership of the rent, but upon an equitable obligation (*i. e.*, an obligation imposed upon the defendant by equity) either to give the plaintiff seisin and to attorn to him, or not to set up the defence of want of seisin or want of attornment.

¹ Moo. 626.

² Moo. 626, pl. 85; cited 1 Ch. Cas. 147 (*nom. Ferris v. Newby*), and 3 Ch. Cas. 91.

³ Moo. 805.

Therefore, in strictness, these cases do not belong to the present inquiry.

It is further to be observed that, in such cases, according to modern practice, if the merits of the plaintiff's case be controverted by the defendant, there must be a trial at law, under the direction of the court of equity, before final relief can be given; and the court of equity, in decreeing a trial at law, will direct that the defendant do not set up the defence (*e.g.*) of want of seisin, or want of attornment. It will be seen, therefore, that the obligation which equity enforces in such cases is always negative. If, indeed, equity should treat the obligation as affirmative, and decree the defendant (*e.g.*) to give the plaintiff seisin, or to attorn to him, it would stop there, and leave the plaintiff to sue at law independently of equity, just as if he had obtained seisin or an attornment without the aid of equity; but in modern times equity declines to give such relief, and for very good reasons. If equity interferes at all, it will insist upon controlling the entire litigation; and if a trial at law is necessary, it will insist upon its being had under its own direction.

If a rent be reserved or granted out of incorporeal property, *e.g.* out of tithes,¹ or out of a manor in which there are no demesne lands, and which consists, therefore, only of a seigniorial or services,² or out of tolls,³ as there can of course be no distress, a bill in equity to enforce payment of the rent will be entertained. So if an owner of rent be unable to identify the land out of which the rent issues, because of the uncertainty and confusion of boundaries, and therefore cannot distrain, he will be entitled to come into equity to have the boundaries of the land ascertained, and payment of the rent enforced.⁴ So if the existence of a rent be clearly proved, but it cannot be ascertained what kind of rent it is, and hence the owner of it cannot distrain, he will be entitled to relief in equity.⁵ There seems to be the same reason for giving relief in equity to an owner of rent who has no right to distrain, though there seems to be no

¹ Thorndike *v.* Allington, 1 Ch. Cas. 79; Busby *v.* Earl of Salisbury, Finch, 256, cited (*nom.* Berkeley *v.* Salisbury), 2 Bro. C. C. 518.

² Duke of Leeds *v.* Powell, 1 Ves. 171.

³ Duke of Leeds *v.* New Radnor, 2 Bro. C. C. 338.

⁴ Boreman *v.* Yeat, cited 1 Ch. Cas. 145; Cocks *v.* Foley, 1 Vern. 359; North *v.* Strafford, 3 P. Wms. 148; Benson *v.* Baldwin, 1 Atk. 598; Duke of Bridgewater *v.* Edwards, 6 Bro. P. C. (Toml. ed.) 368.

⁵ Collet *v.* Jaques, 1 Ch. Cas. 120; Cocks *v.* Foley, 1 Vern. 359.

authority directly upon the point.¹ The absence of English authority may be due to the fact that no such question can have arisen in England since the statute of 4 Geo. II. c. 28, s. 5.² It has been held, in two cases,³ that the fact that no sufficient distress can be found on land out of which a rent issues, does not authorize the owner of the rent to resort to equity for relief; but it seems impossible to support these cases upon any principle. It is admitted that equity will interfere, if the right to distrain be rendered fruitless by fraud; and yet fraud does not seem to affect the question. The ground upon which a rent-owner must be relieved in equity, if at all, is the want of a sufficient remedy at law, and whether that ground exists or not, does not at all depend upon the conduct of the rent-payer. If, indeed, the supposed fraud could be made the ground of relief, the case might be different; but that seems to be impossible. To prevent a distress by fraud is, like any other fraud, a tort; and, such a fraud having been committed, the only way in which equity can relieve against it is by compelling the tortfeasor specifically to repair his tort; but how can equity compel the specific reparation of such a tort? It was, indeed, prayed in one case⁴ that a sufficient distress be set out by the defendant, but the granting of such relief would clearly be out of the question.

If a court of equity assume jurisdiction of a bill to enforce the payment of rent, what will be the relief which it will grant against the land out of which the rent issues? It was held in one well considered case⁵ that a sale of the land would be directed, and the proceeds of the sale applied to the payment of the rent. But there seem to be two serious objections to such a course: 1st, such relief is not well adapted to a case where payments in annual, semi-annual, or quarterly instalments are to be provided for, perhaps for an indefinite period; 2dly, a rent, as has been already seen, is not in its nature a charge upon the *corpus* of the land out of which it issues, but merely upon its fruits and income; and when a court of equity gives relief upon the foundation of a legal right, it cannot extend its relief beyond the legal right. It seems, therefore, that

¹ In *Champernoon v. Gubbs*, Ch. Prec. 126, the plaintiff's counsel said: "If the rent had been granted without any clause of distress, or any other remedy at law, he might have had relief here."

² See *supra*, p. 84, n. 1.

³ *Davy v. Davy*, 1 Ch. Cas. 144; *Champernoon v. Gubbs*, 2 Vern. 382.

⁴ *Champernoon v. Gubbs*, 2 Vern. 382; Ch. Prec. 126.

⁵ *Cupit v. Jackson*, 13 Price, 721.

the appointment of a receiver, and the application through him of the net income of the land to the payment of the rent, is the proper relief against the land. It seems, however, that, in case of a rent reserved, any deficiency of income in any year must be made good out of the surplus income of any subsequent year; and, in case of a rent granted, if for a limited period of time, it seems that the owner of the rent is entitled to receive the net income of the land until all arrears of the rent are paid.

In one case,¹ the plaintiff prayed the court to decree to him the possession and enjoyment of the land until, by receipt of the rents and profits, he should be paid what was due to him, and his counsel cited two unreported cases in which he said such relief was given; but this seems to be inadmissible, as going beyond the plaintiff's legal rights; and even if such relief were admissible, the appointment of a receiver would be a much more judicious course.

Although a rent-owner is entitled to go into equity only for the purpose of obtaining relief against the land, yet, if he obtain relief against the land, equity will give him relief also against the defendant personally, so far as the defendant is by law personally liable for the rent. Great care must, however, be taken not to direct a defendant, in general and unqualified terms, to pay whatever shall be due to the plaintiff, unless the defendant is by law liable for the whole of the rent. If the defendant has absolutely covenanted to pay the rent, of course he is liable on his covenant, and no difficulty will arise. But if his liability is only by reason of his having been the assignee of the term on the creation of which the rent was reserved, or the grantee of the estate out of which the rent was granted, his liability will begin only when the assignment or grant is made to him, and it will continue only so long as the term or estate remains vested in him; and such a defendant can never be directed by the decree in general and unqualified terms to make payments of rent thereafter to accrue, for even if the estate remain vested in him when the decree is made, it will be liable to be divested, and his liability thus terminated, at any moment. On the other hand, he will be liable absolutely for all the rent that has accrued during the time that the estate has been vested in him, and his liability will not be limited to his receipts. In short, the defendant will either be liable absolutely, or he will not be liable

¹ *Champernoon v. Gubbs, supra.*

at all; and, therefore, there would seem to be no propriety in directing him to account for the rents and profits of the land.

Passing now from the subject of rent to that of tithe, it may be remarked that the latter, unlike the former, has ceased to be of much practical importance even in England, and hence the law applicable to it is chiefly interesting for the principles which it involves.

Attention has already been called to a few points in which rent and tithe are alike;¹ but perhaps their differences are more important than their resemblances. First, rent, as has been seen, is created entirely by the acts of the parties interested in it, and its form and incidents are such as the parties choose, within the limits of the law, to give it. In short, the law has no purpose of its own to serve, nor any policy of its own to promote, in regard to rent; and in this respect rents may be likened to contracts. In regard to tithe, however, it is very different; for every obligation to pay tithe is created by the law alone; and hence the nature of the obligation is such as the law makes it, while its form and incidents are such as the law gives it. Moreover, the law by which the obligation is created is uniform in its operation, and hence the nature of the obligation, and also its form and incidents, are always the same; and therefore it follows that the subject of tithe is primarily much less complex than that of rent. Indeed, the creation of the obligation to pay tithe is simply an act of sovereign power, exercised at the expense of private persons, but for the benefit of the public. In truth, tithe is a species of tax; and the law governing it is a part of the public law of the State. According to modern ideas, this tax should be collected and applied by public authority; but in fact the right to receive the tithes payable in each parish is vested in the parson of the parish as a private right: otherwise there would be no propriety in speaking of the subject of tithe in this place.

Secondly, while a rent is generally payable in money,—the amount of which is fixed, and constitutes a debt in the strict English sense,—predial tithe is always by law payable in kind,² *i. e.*, it consists of one tenth of the actual produce of the land. Hence it is necessary that the tenth part be separated from the other nine parts before the tithe-owner can receive his tithe; but the moment that a separation takes place, the right of the tithe-owner undergoes

¹ See *supra*, p. 78.

² There seems to be no doubt that rent also was in fact originally payable in kind.

a change; for the title to the tenth part then vests in him as its owner. Moreover, the separation of the tenth part from the other nine parts was a duty imposed upon the tithe-payer (*i. e.*, the occupier or owner of the land); and the performance of this duty (which was called the setting out of tithe, and which was the only duty or obligation imposed upon the tithe-payer) constituted the payment of tithe.

Thirdly, tithe was originally the mere creature of the canon law; and, as that law could not create a real obligation, payment of tithe was secured only by means of the personal duty before mentioned, imposed upon the tithe-payer, and enforced by ecclesiastical censures, or by such other penalties as the civil power placed at the disposal of the canon law judge. At a very early day, however, — as early, indeed, as the time of the Heptarchy,¹ — the right of the Church to receive tithe was recognized in England by the civil power, and thus the right became a real obligation, though the personal duty still remained as before.

Fourthly, while the civil power thus changed the nature of tithe, it did not provide any new remedy, except indirectly and by way of penalty,² for enforcing its payment; and hence a suit in the ecclesiastical courts continued to be the ordinary remedy for enforcing the payment of tithe until comparatively modern times, when the jurisdiction of those courts was superseded by the Court of Chancery. This change of jurisdiction, however, caused no change in the nature of the remedy. The suit for tithe in the ecclesiastical courts was founded on the duty to set out tithe, and on the breach of that duty by the defendant, and the foundation of a suit in equity for tithe is the same. Since, however, a suit in equity for tithe is not founded, except indirectly, upon the real obligation to pay tithe, this is not the proper place to consider the nature and incidents of such a suit, or the reasons for equity's entertaining it.

Fifthly, the result therefore is that we have the singular anomaly of a real obligation without any remedy against the land on which the obligation rests, and consequently without any "real" security for the performance of the obligation. The reasons for this, however, are not exclusively historical. From the nature of the

¹ 2 Bl. Com. 25, 26; 3 Burn's Eccl. Law (Phillimore's ed.), 679.

² See 2 & 3 Edw. VI. c. 13, s. 1. By 32 Hen. VIII. c. 7, s. 7, rent-owners were authorized in certain cases to bring writs of assize and other appropriate real actions to establish their rights; and it was consequently held that ejectment might be brought for the same purpose, as a substitute for a real action.

obligation, as has been seen, the remedy can be only against the products of the land, — not against the land itself. From the nature of the obligation also, it is not easy to give the tithe-owner any legal claim against the products of the land until the tenth part is separated from the other nine parts. Could the ecclesiastical courts, or courts of equity, have enforced specific performance of the duty of setting out tithe, or specific reparation of a breach of that duty, and thus have afforded to the tithe-owner an effective “real” security, at least from the moment when the tithe was set out? No, clearly not. First, there is only one time when tithe can, in the nature of things, be effectively set out, namely, when the crops have been severed from the soil, but still remain in the field where they grew; and it is not practicable for any court to compel the doing of anything at any precise time. Secondly, for the same reason, specific reparation is out of the question. Thirdly, the setting out of tithe consists of so many particulars, and involves so much exercise of judgment, care, and honesty, that it would be very injudicious for any court to attempt to enforce it specifically.

The conclusion therefore is that a compensation in money seems to be the only remedy practicable for a refusal or neglect to set out tithe, without a radical change in the nature of the obligation itself.

C. C. Langdell.

IMPROVEMENT IN CRIMINAL PLEADING.

FROM time to time there are sharp expressions of impatience with the results of important criminal trials in this Commonwealth.¹ Such expressions are not so frequent as they well might be. And if all of the proceedings in criminal causes, unimportant as well as important, were well understood, there is little doubt that dissatisfaction would be felt to so great an extent as to create a loud call for a revision of our methods. The need of an overhauling becomes apparent to one who examines our present system of criminal pleading and procedure. There are faults which result in positive public harm. That these can be corrected has been and is the opinion of those charged with the administration of the law, and of students of the system. State officials have made suggestions of changes, but have limited their recommendations. The Supreme Judicial Court has recognized that improvement might be made. It is certain that reform must come. There is no sufficient reason why it should not be begun at once.

The first step in criminal procedure for us to consider is the formal accusation, which ordinarily is by way of complaint or indictment. Informations are so infrequent that there is no occasion to consider them in this article. No change is needed in the method of entering a complaint. The rules with respect to setting out offences are the same in complaints as in indictments. They will be considered hereinafter when the subject of indictment is reached.

So far as the grand jury — the body which presents the indictment — is concerned, there is no trouble of consequence. It does its duty speedily and well. Although it is influenced to a considerable extent by the advice of the prosecuting officer, there are many occasions when it acts independently and to excellent advantage. In prosecutions for most offences its acts are satisfactory. In some

¹ This feeling is not confined to this State. There are occasional outbursts of protest against the way in which the criminal law is administered elsewhere. No one could hear the paper recently read before the Unitarian Club in Boston by Ex-President A. D. White without being strengthened in the conviction that a remedy must be sought and applied. The same general defects exist in many of the States. Some have special difficulties growing out of local statutes and decisions. With honest effort on the part of the Legislatures, most of such difficulties can be remedied.

offences they are especially so. In cases arising from alleged violation of election laws, and from words and writings in the course of political campaigns, the grand jury stands as a safeguard from excess of zeal or lack of proper attention on the part of prosecuting officers. It relieves them from pressure which, brought to bear in the heat of party excitement, is hard to withstand. It is an independent body, responsible to no one, yet bound by rules of law furnished by the courts; so that if there should be any inclination to act illegally, which very rarely happens, such inclination is held in check. As it is not practicable or safe to bring influence to bear on the members of this body, the attempt is seldom made. The members are selected from the different towns and cities in the county. They have peculiar knowledge of local needs, and as occasion requires they present public corporate bodies, as well as others, for failure to perform their duties, — such as neglect to repair ways, provide schoolhouses, and the like. They visit public institutions, and give valuable suggestions at times when no formal presentment is made. Good results are reached in this quiet and effective way.

It is an ancient institution, which has proved its value by centuries of satisfactory work. It should not be set aside without good reason. Danger may well be apprehended if the power to institute public prosecutions be given to one person.

The first trouble of consequence occurs in drawing the indictment. This should be plain and simple in its terms; but frequently it is not.

The timidity of the pleader, the requirements of pleading at common law, and Article XII. of the Declaration of Rights in the Constitution of Massachusetts, are the chief obstacles, actual and seeming, in the way of improvement.

The pleader is fearful lest, in departing from time-honored forms, he may put the prosecution in peril of failure. He is loth to construct new forms, and therefore adheres to the antiquated precedent. As in ancient days the test was whether the case could be brought to fit the writ, so now the inquiry many times is whether the case fits the form of indictment. The pleading is highly technical. It is confused by the variety of forms adopted and rigidly adhered to. These are far from uniform. We have a collection of precedents adjudged sufficient in form, some of which are plain to any one, and others involved and wellnigh unintelligible, except to those specially trained in the subject. The latter forms are our

concern. Many of them have come down from a time when the indictment was in the Latin tongue. They are translations which preserve literally the form and construction of the old Latin indictment. The language is quaint, and requires close attention for an understanding of the real nature of the charge. Again, one pleader was more prolix than another. But the form, prolix or terse, being declared good, was followed, and is followed to-day. So there came lack of uniformity. If skilled pleaders had originated all of the precedents, it is safe to say that a more uniform system would have resulted.

Many if not most of the forms may be made more simple if the pleader will make the effort. But it is not probable that any concerted action will be taken by those who frame the indictments. There are occasional instances where the forms are abbreviated. They are rare, however. Further brevity should be practised. Still the change will necessarily be so extensive that no substantial improvement can be expected without legislative action.

According to Lord Hale, an indictment is a plain, brief, and certain narrative of an offence committed by any person, and of those necessary circumstances that concur to ascertain the fact and its nature. The general principles of pleading with respect to declarations at common law and to indictments were the same. The chief rule was that the indictment should be plain and certain. This was required in order that the accused should know what he was to answer, that he might not be tried again, that there might be a proper judgment, and that posterity might know what law was to be derived from the record. The difficulty has been in the application of the rule, simple in itself, but confused in time by the variety of forms adopted by those framing the indictments and ultimately sanctioned by the courts. It was easy to understand and apply the rule so far as it related to time, place, value, and the name of the injured person; but the confusion arose when the rule was applied to the description of property and of the offence. The pleader could state some kinds of property readily enough, but ordinarily he could not specify accurately as to money. He could not give an exact description of each bill and coin. And so several general descriptions were set forth in the hope that some one or more would be proved at the trial.¹ Under the rule of the law,

¹ In indictments for larceny the common allegation is: "— promissory notes current as money in this Commonwealth, each of the denomination and value of —"

proof of one would suffice. Many of these recitals are in use to-day.

It is not worth while to enumerate further instances of expanded descriptions of property. The foregoing is sufficient to show that a change in the direction of brevity should be made. As for the description of the offence, the reader will call to mind the long precedents of indictments for manslaughter by negligence, perjury, obtaining property by false pretences, and other offences. Counts in indictments are multiplied. It is not necessary to use many pages of words in such cases.¹ No useful purpose is served thereby. Many unnecessary questions are invited at the trial which would not arise if the forms were shorter.

In most statutory offences the indictment is reasonably plain. The general rule is that it is sufficient to charge the offence in the words of the statute. But there are perplexing exceptions.²

Undoubtedly, the merciful inclination of the judges in favor of life accounts for a large part of the purely technical requirements in the old indictments. The technical rules served a justifiable and even necessary purpose in restraining the brutal severity of the criminal law a century ago. The criminal law of to-day is not brutal or unduly severe. Therefore the reason for the rules has ceased to exist. Many feel that, in the anxiety for the protection

dollars," (the allegation repeated for the several denominations, — two, five, ten, etc.,) "a more particular description of which is to said (grand) jurors unknown, — silver coins of the coinage of the United States, each coin of the amount and value of — cents," and so on, repeating the allegation so as to include the various denominations. A statute containing a provision that it shall be sufficient to allege generally money to a certain amount, similar to the one relating to embezzlement (Pub. Sts. c. 203, § 44), would suffice to correct this practice.

¹ An approved precedent of an indictment for manslaughter by negligence occupies nearly five pages, large octavo. Train & Heard, *Prec. Indict.* 263. A precedent in Heard's *Criminal Law*, p. 521, contains seven counts, varying in length from a page and a half to two pages and a half. These forms were taken from Cox's *Criminal Cases*, and were framed before 1851. They are followed to-day in this State.

The Maverick Bank prosecutions in the United States courts (Mass.), 1892-93, furnish examples of multiplication of counts. Nine indictments, containing one hundred and eighty-one counts, were found in the District Court against Asa P. Potter. One count was nol-prossed and the remaining one hundred and eighty were quashed for insufficiency. Two indictments, containing one hundred and ten counts, were found against him in the Circuit Court. Fifty-eight of these were quashed. The defendant was convicted on fifteen and acquitted on twenty-five. Judgment was entered in his favor on twelve. The convictions were set aside for errors which occurred at the trial. It should be said that some of the counts set forth different offences.

² *Com. v. Doherty*, 103 Mass. 433; *Com. v. Barrett*, 108 Mass. 302; *Com. v. Connelly*, 163 Mass. 539.

of the rights of the accused, the rights and safety of the public have in a measure been lost sight of. The Legislature can give great assistance. Is there any good reason why the criminal pleadings should not be as plain and simple as the pleadings at law? Time and statutes have changed the pleadings in civil actions, so that to-day the pleaders state their claims in language readily understood by the layman. Should the indictment be more involved? The office of each is to inform the defendant of that which he is charged with having done or failed to do.

Such unnecessary technical requirements are the source of serious public harm.¹ This has been recognized from early times. Lord Hale observed, "That in favor of life great strictnesses have been in all times required in points of indictments, and the truth is that it is grown to be a blemish and inconvenience in the law and the administration thereof; more offenders escape by the over easy ear given to exceptions in indictments than by their own innocence, and many times gross murders, burglaries, robberies, and other heinous and crying offences escape by these unseemly niceties, to the reproach of the law, to the shame of the government, and to the encouragement of villany, and to the dishonor of God. And it were very fit that by some law this overgrown curiosity and nicety were reformed, which is now become the disease of the law, and will I fear in time grow mortal without some timely remedy."²

Other writers have recognized the need of thorough change, and repeatedly have expressed their opinions in unmistakable language. In England, nearly forty-five years ago, Parliament passed an act³ which brought relief. The workings of the criminal courts under

¹ The recent case of *Com. v. Wheeler*, 162 Mass. 429, furnishes an example of the technical strictness of the law of criminal pleading to-day. The defendant was indicted for breaking and entering. The indictment began in the usual way: "Commonwealth of Massachusetts, Worcester ss." It then described the defendant as of Buckland, in Franklin County, and set forth that the offence was committed at "Westminster, in said county." The court held that the indictment should have been quashed by the Superior Court, because it did not allege with sufficient certainty that the offence was committed in Worcester County. The court said: "While the court knows that there is a town named Westminster in the county of Worcester, there is no allegation that the offence was committed at the town of Westminster, but simply at Westminster, which is not alleged to be a town or place within the county of Worcester."

² 2 Hale, P. C. 193.

³ 14 & 15 Vict. c. 100. Administration of Criminal Justice Improvement Act, Aug. 7, 1851. There is a call for still further change in England. Since this article was placed in the hands of the printer, there has appeared in the *Law Quarterly Review* for April an article on indictments, by H. L. Stephen, advocating greater simplicity and brevity.

this and subsequent acts have been satisfactory. It is interesting to note the preamble to the act: —

“Whereas offenders frequently escape conviction on their trials by reason of the technical strictness of criminal proceedings in matters not material to the merits of the case; and whereas such technical strictness may safely be relaxed in many instances, so as to ensure the punishment of the guilty, without depriving the accused of any just means of defence; and whereas a failure of justice often takes place on the trial of persons charged with felony or misdemeanor by reason of variances between the statement in the indictment on which the trial is had and proof of names, dates, matters, and circumstances therein mentioned, not material to the merits of the case, and by the misstatement whereof the person on trial cannot have been prejudiced in his defence; be it therefore enacted,” etc.

Many of the evils removed by this statute in England exist with us to-day. Guilty persons are acquitted in consequence of the lack of proper and reasonable rules of law in this regard. The extent of this failure of justice is not easily ascertained. Our published reports show only the cases wherein the justices presiding at the trials have ruled in favor of the Commonwealth. They do not show the cases wherein the rulings have been favorable to the accused. Hence many cases in which the prosecution has been delayed or defeated on account of some technical defect or error not going to the merits of the case are not known to the public. That is to say, the reasons for the delay or failure are not known. The public finds fault somewhat blindly, but after all justly. For it is a public misfortune when a guilty person escapes punishment through a mere technicality.

Legislation alone can cure these evils. Some statutes in this direction have already been enacted. These have done good, but they are not comprehensive enough.

We have seen that the pleaders, through fear of possible failure, were led to perpetuate the redundancy of some of the ancient forms, — a redundancy not required by the law, — and have noted the confusion which arose therefrom. We have also seen the harm resulting from the actual requirements of the common law. It now remains to consider the constitutional objections.

Article XII. of the Declaration of Rights has seemed to be an obstacle in the way of further reform. It is believed, however, that the obstacle is seeming rather than real, and also that a brief examination of this subject matter will show that the objection to

change assumes constitutional difficulties which do not exist; that these from frequent assertion have acquired thereby a certain degree of respect. Certainly useful changes have been prevented by this assumption of difficulty. The objection is that simplyfying the indictment to any considerable extent would be contrary to that article, and consequently unconstitutional. It therefore is necessary to see what the article is, and what it means. The portion which concerns us is that the crime shall be "fully and plainly, substantially and formally described." These few words have stood in the way of the enactment of statutes, and have been the *bête noire* of pleaders. Fortunately the courts have given their interpretation of the meaning of the words from time to time. More than sixty years ago it was said of the article:—

"Whilst it is important to the administration of public justice and the reasonable execution of the laws that indulgence should not be too readily yielded to mere technical niceties and subtleties, it is also important that every man accused of crime should have a reasonable opportunity to know what the charge is, that he may not be called to meet evidence at the trial that he could not have anticipated from the charge, that the court may know what judgment to render, and that the party tried and either acquitted or convicted may be enabled, by reference to the record, to shield himself from any further prosecution for the same offence."¹

Again, it was said by the same justice:—

"The object of the Declaration of Rights was to secure substantial privileges and benefits to parties criminally charged; not to require particular forms, except where they are necessary to the purposes of justice and fair dealing towards the persons accused, so as to ensure a full and fair trial."²

In *Com. v. Robertson*,³ where the Attorney General broke away from some of the technical allegations until then incorporated in indictments for murder, the indictment was held good, and within the constitutional limit. Knowlton, J., said: "The provisions of Article XII. of the Declaration of Rights, which secure to the accused person the right to have his crime or offence 'fully and plainly, substantially and formally described to him,' only require such particularity of allegation as may be of service to him in enabling him to understand the charge and to prepare his defence."

¹ Shaw, C. J., in *Com. v. Phillips*, 16 Pick. 211, 214 (1834).

² *Com. v. Holley*, 3 Gray, 458.

³ 162 Mass. 90.

The indictment in this case was as follows:—

“That Daniel M. Robertson of New Bedford in the county of Bristol, at New Bedford in the county of Bristol, on the ninth day of September in the year of our Lord eighteen hundred and ninety-three, in and upon one Mary Robertson, feloniously, wilfully, and of his malice aforethought an assault did make, and with a certain weapon, to wit, a knife, which the said Daniel M. Robertson then and there held, her, the said Mary Robertson, feloniously, wilfully, and of his malice aforethought did strike, cut, stab, and thrust in and upon the head of her, the said Mary Robertson, giving to her, the said Mary Robertson, by the striking, cutting, stabbing, and thrusting in and upon the head of her, the said Mary Robertson, one mortal wound, of which said mortal wound the said Mary Robertson then and there died.

“And so the jurors aforesaid, upon their oath and affirmation aforesaid, do say that the said Daniel M. Robertson the said Mary Robertson, in manner and form aforesaid, then and there feloniously, wilfully, and of his malice aforethought did kill and murder, against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.”

Prior to *Com. v. Robertson* the form in use was substantially like the following:—

“That William Coy of Westfield aforesaid, on the thirtieth day of August in the year of our Lord one thousand eight hundred and ninety-one at Washington aforesaid in the county of Berkshire aforesaid, with force and arms in and upon one John Whalen feloniously, wilfully, and of his malice aforethought, did make an assault, and that he the said William Coy then and there with a certain axe which he the said William Coy in his hands then and there had and held, him the said John Whalen in and upon the head of him the said John Whalen, on the left side of the head of him the said John Whalen in front of the ear, and near to the left ear of his the said John Whalen’s said head then and there feloniously, wilfully, and of his malice aforethought did strike, giving unto him the said John Whalen then and there at Washington aforesaid in the county of Berkshire aforesaid, with the axe aforesaid, by the stroke aforesaid, in the manner aforesaid, in and upon the head of him the said John Whalen on the left side of his said head and in front of and near the left ear of his the said John Whalen’s said head, one mortal wound of the length of four inches, of the breadth of one inch, and of the depth of one half-inch, of which said mortal wound the said John Whalen then and there instantly died; and so the jurors aforesaid, upon their oath aforesaid, do say and present that the said William Coy him the said John Whalen in manner and form aforesaid then and there at Washington aforesaid, feloniously,

wilfully, and of his malice aforethought, did kill and murder against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided." ¹

In England the statutes provide that in indictments for murder it is not necessary to set forth the manner in which or the means by which the death of the deceased was caused, but it is sufficient to charge that the defendant did feloniously, wilfully, and of his malice aforethought kill and murder the deceased.

A statute like this, if passed by our Legislature, would probably be declared unconstitutional. The indictment with us must contain some description of the act. An indictment setting forth that the defendant at a time and place stated, feloniously, wilfully, and of his malice aforethought assaulted the deceased and feloniously, wilfully, and of his malice aforethought killed and murdered him by striking him on the head with an axe, would seem to preserve all the constitutional rights of the defendant, and ought to be sufficient if authorized by statute. A slight change would suffice to make the charge murder in the second degree. The latter charge cannot be made under our present practice.

Information of the charge is what must be given. If this is provided, the constitutional limit is not passed. But the essential matters must be stated; if any of these are omitted, the limit is transgressed. Where the statute provided that a person convicted of drunkenness should be punished by a fine of one dollar, and also that, if the person had been convicted of drunkenness twice within the twelve months next preceding such conviction, he should be punished more severely, and the same statute provided that it should not be necessary to allege in the complaint the previous convictions, it was held that the latter clause was in conflict with the Declaration of Rights, and therefore void.² The reason for this is obvious. When a statute imposes a higher penalty upon a third conviction, it makes the former convictions a part of the character of the crime intended to be punished. They are essential to the offence, and therefore must be stated.³ It does not follow, however, that the recital must be long. Information of the charge is what must be given, and this is all. In imparting this, simple and direct statement surely ought to be used. This is conveyed by some words which in themselves are descriptive. Words of art like

¹ *Com. v. Coy*, 157 Mass. 200.

² *Com. v. Harrington*, 130 Mass. 35.

³ *Com. v. Walker*, 163 Mass. 226.

"burn" in arson,¹ "assault," "break," "enter," furnish all the information which the defendant can require so far as the indictment is concerned. No description of the means employed to cause the burning, assault, etc., need be set out. Other words and expressions will occur to the reader. Why should the long recitals given in the precedents be necessary in charging embezzlement, or perjury, or homicide? Many of them are not essential. Instead of furnishing certain information, as construed by the courts, they lend uncertainty to the proceedings. In some few cases a curious result has been reached. The rule requiring certainty of statement has been perverted by excess of allegation so as to cause uncertainty at the trial. The courts have been unwilling that the meritorious case should fail by reason of some variance between an unnecessarily detailed statement in the indictment and the proof at the trial, and so have decided that the variance is not material. There are many instances where they have said that the variance between the allegation and the proof is immaterial if the proof shows the thing to be of the same general nature. In homicide, where the charge is causing death by throwing on the floor, proof of death caused by throwing upon a chair is sufficient.² But the decisions are not uniform in this regard. It is not within the plan of this article to undertake to reconcile them. Although in an indictment for the larceny of a horse, it is not necessary to allege the color of the horse, yet, if the color is stated, it must be proved. Other cases might be cited.³ It is familiar that, with few exceptions, allegations of time and place need not be proved, if the offence is not barred by the statute of limitations, and was committed within the county where the indictment is found.

That the Legislature may deal with the matter of criminal pleading, provided the constitutional provision is not violated, is beyond question. And thus acts may be passed which will not operate to relieve the pleader from imparting the information which we have seen is required to be given to the person accused. The court has

¹ The following is the precedent for arson at common law. It has done long and faithful service. "That A. B., of etc., on etc., at etc., 'feloniously, wilfully, and maliciously did set fire to and burn the dwelling-house of one C. D., there situate.' This is a model. One wonders why such simplicity of form is not the rule, instead of the exception.

² *Com. v. McAfee*, 108 Mass. 458. See also on this subject *Com. v. Morgan*, 149 Mass. 314, and *Com. v. Noble*, 165 Mass. 13.

³ See *Com. v. Wellington*, 7 Allen, 299; *Com. v. Morgan*, 149 Mass. 314; *Com. v. Noble*, 165 Mass. 13.

spoken of this. "We do not think it needs argument to show that the Legislature may dispense with a purely formal averment which would give the defendant no additional information, and the omission of which would not prejudice him."¹

The office of the indictment being principally to convey information of the charge to the defendant, so that he may be prepared at the trial, it would seem that no constitutional right is impaired if the description of the offence is made as accurate as the proof required. Cases have arisen where conviction was practically impossible if the rule of the common law were to be observed. So it was necessary to provide for such cases by statute. The courts have been asked to declare such statutes unconstitutional. It is instructive to read what they have said.

By St. 1864, c. 250, § 1, (Pub. Sts. c. 214, § 26,) it was provided: "No variance between any matter, in writing or in print, produced in evidence on the trial of any criminal cause, and the recital or setting forth thereof in the complaint, indictment, or other criminal process whereon trial is had, shall be deemed material: *provided*, that the identity of the instrument is evident, and the purport thereof is sufficiently described to prevent all prejudice to the defendant." An indictment was found charging the defendant with having in his possession with unlawful intent counterfeit bank bills. A copy of the bill was given in which a name on the bill was stated to be P. E. Spinner. At the trial it appeared that the name on the bill was F. E. Spinner. The defendant contended that there was a fatal variance, and that the statute, so far as it affected this question, was unconstitutional. The court refused to adopt this view of the statute. "We entertain no doubt of the constitutionality of this section [one], which promotes the ends of justice by taking away a purely technical objection; while it leaves the defendant fully and fairly informed of the nature of the charge against him, and affords him ample opportunity for interposing every meritorious defence. Technical and formal objections of this nature are not constitutional rights."²

For many years the following statute has been in force substantially as it is given in Public Statutes, c. 203, § 44:—

"In prosecutions for the offence of embezzling, fraudulently converting to one's own use, or fraudulently taking and secreting with intent so to

¹ Holmes, J., in *Com. v. Freelove*, 150 Mass. 66.

² *Com. v. Hall*, 97 Mass. 570; *Foster, J.*, p. 573.

embezzle or convert the bullion, money, notes, bank notes, checks, drafts, bills of exchange, obligations, or other securities for money, of any person, bank, incorporated company, partnership, city, town, or county, by a cashier, or other officer, clerk, agent, or servant of such person, bank, incorporated company, partnership, city, town, or county, it shall be sufficient to allege generally in the indictment an embezzlement, fraudulent conversion, or taking with such intent, of money to a certain amount, without specifying any particulars of such embezzlement; and on the trial evidence may be given of any such embezzlement, fraudulent conversion, or taking with such intent, committed within six months next after the time stated in the indictment; and it shall be sufficient to maintain the charge in the indictment, and shall not be deemed a variance, if it is proved that any bullion, money, notes, bank note, check, draft, bill of exchange, or other security for money of such person, bank, incorporated company, partnership, city, town, or county, of whatever amount, was fraudulently embezzled, converted, or taken with such intent, by such cashier, or other officer, clerk, agent, or servant, within said period of six months."

It was contended in *Com. v. Bennett*,¹ that this statute was unconstitutional. The allegation in the indictment was "certain money to the amount and value of twenty-five thousand dollars . . . did embezzle and fraudulently convert to his own use." This was held sufficient under the statute. With reference to the claim of unconstitutionality, the court said, "Nor is it open to the objection that the offence is not set forth 'fully and plainly, substantially and formally,' as required by the Declaration of Rights, Art. XII. The defendant, if he had desired, could have applied for a specification of the particular acts relied on by the government, as may be done in other cases where the offence is of a general nature, and the charge is in general terms. Such an application might have been made at the trial, and granted by the court if in its discretion the circumstances of the case required it."

The power of the court to order specifications is undoubted, and has been exercised from early times; so no surprise is waiting the defendant at the trial in cases where the allegation is general.² From these cases it is reasonably plain that the courts will sanction, and even welcome, statutes which will assist in simplifying criminal pleading and procedure; and that, if the statute provides that the real and substantial elements which go to make up the offence are

¹ 118 Mass. 443.

² See *Com. v. Snelling*, 15 Pick. 321, where the defendant, who had been indicted for publishing a libel, was required to furnish specifications in support of justification.

to be set out, the courts will not declare it void as infringing the constitutional provision.

There is much to be done. With proper legislation the present formal requirements can be done away with and the substantial matters only retained. Prominent among the offences needing radical treatment are embezzlement and false pretences. With such legislation, forgery, perjury, and many offences will not present the difficulties which now exist. No substantial rights will be taken from the accused, and the public will derive a great benefit.

Much delay would be saved if trivial and purely formal mistakes in the indictment could be amended. It is generally assumed that there is no power to allow this to be done. It is not so clear, however, that the Legislature may not empower the court to cause such amendments to be made. In *Com. v. Holley*,¹ a statute authorizing amendment was upheld. The indictment in that case was found under St. 1852, c. 322, § 12, and charged the defendant with being a common seller of intoxicating liquor, and set forth a prior conviction. The statute provided a higher penalty for a second offence of this nature; therefore the recital of the former conviction was essential. There was an error in this recital. The prosecuting officer was allowed to amend. The statute authorized this. The constitutionality of this provision of the statute was attacked; but the court upheld it. Shaw, C. J., in delivering the opinion, said (p. 459):—

“But the court are of opinion that the statute is not open to this objection. . . . The statute certainly intends to punish a party, on a second conviction, with greater severity than on the first, and therefore it is proper that the accused should understand from the indictment that he is charged with an offence aggravated by the fact of a prior conviction. . . . But such prior conviction is a collateral fact, which can only be proved by record, and therefore, in whatever form it is alluded to or mentioned in the indictment, it must be made certain by the record, when produced. There is no danger, therefore, that a party can be injured by such an amendment, because it must conform to the record; otherwise the record will not prove it, or sustain the averment of a former conviction. It is a part of the indictment which derives increased weight from the finding of the grand jury, and one upon which they pass no judgment, but merely report the prior conviction, to be verified and identified wholly by the production of the record. The great principle asserted by the Declaration of Rights is that no man shall be put to answer a criminal charge until

¹ 3 Gray, 458.

the criminal evidence has been laid before a grand jury, and they have found probable cause, at least, to believe the facts true on which the criminality depends. But, in setting forth a former conviction, they aver no fact resting on testimony, except that of identity of the person charged with the person before convicted. That fact being found, all the particulars respecting the former conviction, as to the nature of the crime, the time and circumstances of its commitment, the time when and the court before whom the conviction was had, and the sentence awarded, must be proved by matter of record, altogether more certain than any finding of a grand jury, upon an *ex parte* hearing, possibly can be, and such prior conviction, being a judgment against the party himself, is necessarily one of which he is conversant, and by which he is conclusively held."

This case is certainly an authority in favor of the right of the Legislature to authorize the amendment of an indictment. The amendment allowed was not one of form merely. As we have seen before, the subject matter of the amendment was a necessary part of the indictment.¹ It was essential to allege and prove that a prior conviction had been had, and that the defendant was the person who had been convicted. The identity of the defendant was a substantial issue. If the government failed to prove this, the case was not within the statute. In trials under the Habitual Criminals Act this issue of identity sometimes is tried at great length. This act provides that whoever has been twice convicted of crime, sentenced and committed for terms of not less than three years each, shall upon conviction of a felony be punished by imprisonment in the state prison for twenty-five years.

This case of *Com. v. Holley* has not been questioned in this State. It has been cited with approval.² If an amendment may be permitted in such a case, it is reasonable to suppose that it may be allowed in a pure matter of form. Legislation authorizing amendments in formal matters would advance greatly the administration of the criminal law.

The work of reform should not be confined to procedure. Much ought to be done with reference to the substantive law of crimes. For example, the technical distinction between larceny, embezzlement, and false pretences—which are merely different forms of theft—should be abolished. But to examine this subject thoroughly would extend this article beyond reasonable bounds.

¹ *Com. v. Harrington*, 130 Mass. 35.

² *Com. v. Hall*, 97 Mass. 570; *Com. v. Harrington*, *ubi supra*.

The purpose of the writer has been to show that evils exist in our present system of criminal pleading, and to point out a remedy. That it will be a laborious task to frame statutes which will render the pleading plain and direct, and the forms simple and harmonious, is thoroughly appreciated. It is believed, however, that this can be done. Is it not worth while to make the attempt? Increased efficiency in the enforcement of our criminal laws is surely to be sought. A successful result would mean an immense public gain.

Franklin G. Fessenden.

March 7, 1896.

FORBEARANCE TO SUE.

IS forbearance to sue upon an unenforceable cause of action a sufficient consideration for a promise? Many respectable authorities declare that it is not; and such is generally the language of text-books on this subject. See also *Davissou v. Ford*,¹ *Long v. Towl*,² and *Harris v. Cassady*,³ for general statements of the same doctrine. One of the strongest cases on this side of the question is *Palfrey v. Portland, Saco, & Portsmouth R. R. Co.*⁴ The plaintiff's husband, an employee of the defendant, was killed while on duty, through the defendant's negligence. The defendant, "in consideration of the premises and of her forbearance to sue it," promised to pay the widow fifty dollars a month during her life, which it did for several years, and then discontinued payment. In a suit by her on such contract (not in tort as the report states), it was held she could not recover; because, the death of her husband being no foundation for an action for damages,⁵ she could not have recovered in her forborne suit, and therefore the defendant's promise was "without consideration and void"; citing *Tooley v. Windham*,⁶ and *Hammon v. Roll*.⁷

In *Dunham v. Johnson*,⁸ Allen, J., says, "Whether forbearance to prosecute a groundless claim is sufficient consideration for a promise to pay money, or under what circumstances forbearance to sue a doubtful or contested demand will be sufficient, it is not necessary to consider," and *Palfrey's* case is cited, without comment.

In *Hammon v. Roll*, *supra*, C held the joint and several bond of A and B, and released A therefrom. Afterwards B, in consideration that C would forbear the collection of said bond till a certain day, promised to pay it at that time; but in assumpsit upon such promise it was held that, as the bond was entirely discharged by the release to A, there was no longer a debt which could be recovered of B, and the promise to forbear was no consideration for B's new promise to pay. See *Herring v. Dorell*.⁹

In *Lloyd v. Lee*,¹⁰ forbearance to sue a note given by a married

¹ 23 W. Va. 617.

⁵ 1 Cush. 475.

⁸ 135 Mass. 313.

² 42 Mo. 545.

⁶ Cro. Eliz. 206; 2 Leon. 105.

⁹ 8 Dowl. Pr. C. 604 (1840).

³ 107 Ind. 158.

⁷ March, 202.

¹⁰ 1 Str. 94.

⁴ 4 Allen, 55 (1862).

woman was held, at *Nisi Prius*, not to be a good consideration for her promise to pay, made when sole; since the note was absolutely void in the first instance.

In *Mulholland v. Bartlett*,¹ the defendant was threatened with a suit upon a claim against a firm in which he was not a partner, and for which he was in no way liable. He gave the plaintiff a written agreement to pay the claim "to avoid the trouble and annoyance of defending myself at law, from being made liable as a partner in said firm." This was held not binding for want of consideration. And see *Bates v. Sandy*.²

Jones v. Ashburnham,³ sometimes cited on this side of the question, turned really upon the fact that, although the plaintiff had a just and valid claim due from a deceased person, yet at the time he promised to forbear suing on it no administrator or representative of such person had been appointed who could be sued, and therefore there could be no forbearance to sue when no suit could even be brought, and so the promise of the defendant to pay the debt in consideration of a promise to forbear was without consideration. *Rosyer v. Langdale*⁴ is much like it. See *Schroeder v. Fink*,⁵ and *Nelson v. Serle*,⁶ which may well rest on the same ground.

Of course, if a plaintiff "well knew" or really believed he had no cause of action, he could not recover for forbearing to sue upon it, as that would be a gross fraud, and merely blackmail. *Wade v. Simeon*; ⁷ *Ormsbee v. Howe*; ⁸ *Ex parte Banner*; ⁹ *Headley v. Hackley*.¹⁰

Perhaps the same rule would apply in a somewhat less degree, if the plaintiff had not the slightest reason to believe he had a good cause of action.

On the other hand, reason and analogy seem to suggest, and the more modern authorities hold, that, if a meritorious claim is made in good faith, a forbearance to prosecute it may be a good consideration for a promise, although on the facts or on the law the suit would have failed of success.

In *McKinley v. Watkins*,¹¹ it was held that a forbearance to sue by one who erroneously but honestly supposes he has a good cause of action is a good consideration for a promise. And see *Miller v. Hawkes*.¹²

¹ 74 Ill. 58 (1874).

² 27 Ill. App. 552 (1888).

³ 4 East, 455 (1804).

⁴ *Style*, 248.

⁵ 60 Md. 436.

⁶ 4 M. & W. 795.

⁷ 2 C. B. 548.

⁸ 54 Vt. 182.

⁹ 17 Ch. D. 480.

¹⁰ 50 Mich. 43.

¹¹ 11 Ill. 140 (1851).

¹² 66 Ill. 185 (1872).

In *Cook v. Wright*,¹ the defendant was agent for a Mrs. Bennett, the owner of certain houses in front of which paving work had been done by the plaintiffs, as trustees of the parish, under the White-chapel Improvement Act of 1853, to the amount of seventy pounds, for which the "owner" was liable by the act. The defendant was tenant of one of the houses, and the trustees contended that he was an owner thereof under the act, and threatened to sue him, unless he gave his notes for thirty pounds, to which the claim was reduced. Thereupon he requested time, which was given him, and he gave his own notes for thirty pounds, on time, the first of which was paid. "At the trial, it appeared that he was not the owner of the houses, and was not personally liable under the act, and that in point of law the plaintiffs were not entitled to claim the money from him though they honestly believed that he was personally liable and intended to take legal proceedings against him for the amount." It also appeared that the defendant did not believe he was liable, and gave the notes solely to avoid being sued. After full argument in the Queen's Bench, it was held that the notes were on good consideration, being given "in order to avoid the expense and trouble of legal proceedings against himself"; Blackburn, J., saying, "If the suit had been actually commenced the point would have been concluded by authority." But that fact was held immaterial, the same judge saying, "It is detriment to the party consenting to a compromise arising from the necessary alteration in his position which in our opinion forms the real consideration for the promise, and not the technical and almost illusory consideration arising from the extra costs of litigation." Cockburn, C. J., and Wightman, J., concurred. Here there was indeed a legal cause of action against Mrs. Bennett, the owner, but there was none against the defendant personally, and he did not believe there was, and his own notes were given solely to avoid a suit against himself.

In *Callisher v. Bischoffsheim*,² the plaintiff, believing that a certain sum was due him from the government of Honduras, was about to take legal proceedings against said government to collect the same; whereupon the defendant, "in consideration that the plaintiff would forbear from taking such proceedings for an agreed time, promised to deliver to the plaintiff certain securities, called Honduras Railway Loan Bonds, to the amount of six hundred pounds," etc. In a suit for a breach of this promise, it was admitted (by a

¹ 1 B. & S. 559 (1861).

² L. R. 5 Q. B. 449 (1870).

demurrer) that "no money was due the plaintiff from the Honduras government," but it was held that the forbearance, notwithstanding, was a good consideration for the promise; Cockburn, C. J., saying, "When a person forbears to sue he gives up what he believes to be a right of action, and the other party gets an advantage, and, instead of being annoyed with an action, he escapes from the vexations incident to it." Blackburn, Mellor, and Lush, JJ., concurred. Judgment for the plaintiff. In this case the plaintiff had no legal cause of action against *any one*, which is still stronger than *Cook v. Wright*. The same principle was approved and acted upon in *Rue v. Meirs*.¹

In *Ockford v. Barelli*,² the plaintiff had married the defendants' father while his first wife was still living, though supposed to be dead. Upon the subsequent death of her *de facto* husband, she made a claim, as widow, for a third of his estate, believing that she was lawfully entitled to it. Thereupon the defendants, heirs to the estate, gave her the following agreement: "In consideration of your abstaining from making, and forbearing to make, any claim against our late father's estate, we hereby respectively undertake to pay you over one third of the net value and proceeds of the estate up to the time of his decease." Upon the authority of *Callisher v. Bischoffsheim*, the forbearance was held a good consideration for the promise, after a full argument and citation of the authorities by the Court of Exchequer. It is not easy to reconcile this case with *Palfrey's case*, before cited.

In *Miles v. New Zealand Alford Estate Co.*,³ the cases of *Cook v. Wright*, *Callisher v. Bischoffsheim*, and *Ockford v. Barelli*, were distinctly approved in separate judgments by Cotton, L. J. (p. 282), by Bowen, L. J. (p. 291), and by Fry, L. J. (p. 297); and the doctrine is declared that a *bona fide* compromise of a real claim is a good consideration, whether the claim would have been successful or not.

If a creditor honestly, though erroneously, supposing his claim is not yet barred by the Statute of Limitations, proposes to sue it and the debtor writes him, "Your claim is too old, but it will cost me fifty dollars to defend a suit, and if you will forbear to bring suit, I will pay you twenty-five dollars for such forbearance," and the creditor does so, can he not recover the twenty-five dollars?

¹ 43 N. J. Eq. 377 (1887).

² 32 Ch. D. 269 (1886).

³ 25 L. T. Rep. 504 (1871); 20 W. R. 116.

In *Hewett v. Currier*,¹ it was held that forbearance by a *sub-contractor* to file a claim for a lien, to which he supposed himself entitled upon a building for which he had furnished materials, is a sufficient consideration for a promise by the owner to pay the amount due, though it afterwards appears that such sub-contractor was not entitled to a lien. And see *Young v. French*,² and *Fish v. Thomas*.³

In *Bellows v. Towles*,⁴ it was held that, if A honestly believes that he has good and reasonable ground to oppose the probate of a will on the ground of undue influence, a promise to pay him five thousand dollars if he will not make such opposition is binding, whether there was or was not any valid ground for opposing the will.

This view brings the doctrine of "forbearance without suit" into harmony with that of a "compromise of an existing suit," which it so much resembles. For it is well settled that a promise to pay part of a claim by way of compromise of a pending suit is binding, even though the suit was not well founded, and the plaintiff therein would not have succeeded. In other words, the validity of the original claim, either in fact or in law, cannot be litigated in the suit for the compromise amount. *Longridge v. Dorville*; ⁵ *Stewart v. Ahrenfeldt*; ⁶ *Feeter v. Weber*; ⁷ *Barlow v. Ocean Ins. Co.*; ⁸ *Grandin v. Grandin*; ⁹ *Prout v. Pittsfield Fire District*.¹⁰ What substantial difference is there between forbearance to further prosecute a suit, and forbearing to commence a suit at all? All the reasons which govern the one apply equally to the other. Still less does that difference seem, when we remember that a compromise, specifically so called, may be made before as well as after a suit has been commenced. *Cook v. Wright*; ¹¹ *Easton v. Easton*; ¹² *Grandin v. Grandin*.¹³ Is it not a distinction without a difference?

Still more does forbearance to sue resemble a compromise when the agreement is to perpetually forbear, and the promise is to pay therefor a stated sum, without reference to the amount of the claim made. If the mere surrender of an unenforceable claim is a good

¹ 63 Wis. 387 (1885). ⁴ Denio, 189 (1847). ¹⁰ 154 Mass. 453, and cases cited.

² 31 Wis. 111. ⁷ 78 N. Y. 334 (1879). ¹¹ 1 B. & S. 559.

⁵ Gray, 45. ⁸ 4 Met. 270 (1842). ¹² 112 Mass. 438.

⁴ 55 Vt. 391 (1883). ⁹ 49 N. J. Law, 508 (1887). ¹³ 46 N. J. Law, 538.

⁶ 5 B. & Al. 117 (1821).

consideration for a new promise, as held in *Haigh v. Brooks*,¹ *Wilton v. Eaton*,² *Churchill v. Bradley*,³ and many other cases; if the formal release under seal of an unfounded claim forms a sufficient consideration for a promise, as so often held; if a covenant under seal never to sue a claim, which is in law not enforceable, is a good consideration, why is not a simple *agreement* to forever forbear to sue a meritorious claim, honestly made, though invalid in law, a good consideration to pay for such forbearance? May we not, therefore, reasonably conclude that a perpetual forbearance to sue a claim honestly and fairly made is a good consideration for a promise to pay for such forbearance, although the suit forborne would have proved unsuccessful?

Edmund H. Bennett.

Boston, June, 1896.

¹ 10 Ad. & El. 309; 2 Perry & Dav. 477.

³ 58 Vt. 403.

² 127 Mass. 174.

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AMERICAN BAR ASSOCIATION.—The meeting of the American Bar Association at Saratoga on August 19th–22d promises to be of extraordinary interest. The Lord Chief Justice of England, Lord Russell, is coming over to deliver the annual address. He will probably be accompanied by three or four prominent members of the English Bar.

PUBLIC OFFICE A PUBLIC TRUST.—That the State employs officials in order that they may serve it, and through it the people, needs scarcely to be said. The proposition, on the contrary, that it is any part of the real purpose of public office to provide officials with salaries, is condemned by its very statement. It is fortunate that the action of the Massachusetts Legislature in taking the last step, the step which made it clear beyond reasonable doubt that, in ordering the preference of veteran soldiers of the late war, it was not concerned with their fitness for office, and the step which could only be justified by regarding good government and competent service as immaterial has met from a unanimous decision of the Supreme Court of the State with the rebuke that it deserved. *Brown v. C. T. Russell, Jr. et al., Civil Service Commissioners* (not yet reported).

The law (chapter 501 of 1895) made mandatory the appointment of any veteran, however unfit, who applied for any office and filed with his application the recommendation of any three citizens "of good repute."

The particular application of this which came before the court was to an office requiring peculiar capacities, that of state detective, and the very ludicrousness of the idea that any veteran of the late war whom any three citizens "of good repute" would certify to be fit must needs be appointed a detective without regard to his fitness may have helped to secure the unanimity of the decision. Clearly one must stop somewhere. The Attorney General (who argued for the constitutionality of the law) is protected by the Constitution. But the public service would get into a sorry state if any veteran could insist on being appointed Assistant

Attorney General. And if the legislature should seriously enact that judgeships of the Superior Court should be open only to veterans, and solely in the order of priority of application or of distinction in the late war, the absurdity, which exists equally in the law just condemned, would be patent even to the most misguided patriot.

The case against the law was also made stronger by the sixth article of the Massachusetts Bill of Rights. "No man nor corporation nor association of men have any other title to obtain advantages or particular and exclusive privileges distinct from those of the community than what arises from the consideration of services rendered to the republic." This the court, aided by the slightly different phrasing of the Virginia Bill of Rights of 1776, whence the provision was taken, holds to mean services rendered as a condition concurrent with exclusive privileges, pointing out very justly that the other construction would justify a life peerage and similar grants of privilege. Taking everything together, then, the court has made its decision impregnable, although perhaps a little narrow in its insistence on all the aspects of the particular case. A law that a man must be installed in a public office requiring peculiar fitness, whether or no he was fit, could not and did not stand.

SELF-INCRIMINATING TESTIMONY.—A United States statute provides that no person shall be excused from testifying before the Interstate Commerce Commission on the ground that his testimony may tend to criminate him; but that he shall not be prosecuted or subjected to any penalty on account of any transaction concerning which he may testify. In *Brown v. Walker*, 16 Sup. Ct. Rep. 644, the Supreme Court recently held, five judges against four, that this statute is not in conflict with the fifth amendment to the Constitution, which provides that no person "shall be compelled in any criminal case to be a witness against himself." The majority of the court was of the opinion that the guarantee against prosecution furnished by the statute amply satisfied the requirements of the Constitution. The only previous decision on the point, *United States v. James*, 60 Fed. Rep. 257, in the District Court, is overruled.

In the well known case of *Counselman v. Hitchcock*, 142 U. S. 547, a previous statute of similar purport, which had merely provided that no evidence given by the witness should be used against him in any criminal proceeding, was declared unconstitutional. The court went on the ground that the protection afforded by the statute was not broad enough, as the testimony might be used to search out other testimony to be used against the witness. Whether the wording of the Constitution required such a decision may perhaps be doubted. In several of the States similar statutes have been held not in conflict with similar constitutional provisions. *State v. Quarles*, 13 Ark. 307; *People v. Kelly*, 24 N. Y. 74; *Kneeland v. State*, 62 Ga. 395. But at all events this particular difficulty is done away with in the later statute by the broad proviso that the witness shall never be prosecuted for the transactions concerning which he testifies. The majority opinion, by Mr. Justice Brown, treats the subject admirably in all its aspects, and reaches what seems to be the sound conclusion.

The two vigorous dissenting opinions bring out, however, at least three possible grounds for disagreeing with the decision. Mr. Justice Field contends, in the first place, that the constitutional amendment was intended to protect the witness, not only from prosecution, but from the

disgrace and infamy which would naturally result from his disclosures; and, secondly, that Congress was exceeding its power in attempting to protect the witness from prosecution, the pardoning power being exclusively a prerogative of the President. As to the first of these arguments, it is difficult to find any authority for it beyond the early case of *Respublica v. Gibbs*, 3 Yeates, 429. The well settled rule, that, if prosecution for the crime is barred by the Statute of Limitations, the witness must testify, is inconsistent with such a view. And it certainly seems on general principles that the constitutional provision was not intended to be pushed to such an extent. The second argument put forward by Mr. Justice Field seems to have even less weight. As is pointed out in the majority opinion, statutes of this sort, which are virtually acts of general amnesty, are by no means uncommon, either in England (see 2 Taylor on Evidence, § 1455) or in this country, and they have, almost without exception, been held constitutional. *State v. Nowell*, 58 N. H. 314; *People v. Sharp*, 107 N. Y. 427; *Ex parte Cohen*, 104 Cal. 524.

The three remaining dissenters, speaking through Mr. Justice Shiras, advance what appears to be a stronger argument. Their contention is that it is beyond the power of Congress to grant immunity from prosecution in the courts of a State for an offence against the State; that therefore the protection afforded the witness by the statute is not coextensive with the constitutional privilege. It hardly seems a satisfactory answer to this to say, with the majority of the court, that the applicability of a federal statute of this sort may well extend to the State courts under the sixth article of the Constitution. On the contrary, it is somewhat difficult to believe that Congress can order a State court to refrain from prosecuting an offender against the State. The true answer to the argument of the dissenting judges would appear to be that the constitutional protection is solely against prosecutions of the government that grants it; that if the witness is guaranteed against prosecution in the federal courts, the fifth amendment is complied with. The possibility of prosecution in a foreign country would not warrant the withholding of self-incriminating testimony. (See the opinion of Cockburn, C. J., in *Queen v. Boyes*, 1 B. & S. 311, 330.) Why should not this rule apply as between the federal jurisdiction and the States?

The decision of the court in *Brown v. Walker* seems on the whole sound in point of constitutional law. And the added power it gives to the Interstate Commerce Commission certainly renders it very satisfactory from a practical point of view.

THE RELATION OF A RECEIVER OF A CORPORATION TOWARDS ITS EXECUTORY CONTRACTS. — When a receiver is appointed to administer the assets of a corporation, the same phrase is commonly used to describe his relation towards the executory contracts of the corporation which is used to describe the relation of an assignee in bankruptcy towards the contracts of his insolvent or the relation of a person just come of age to his contracts made during infancy; namely, that he has a "reasonable time" in which to determine whether to affirm or disaffirm. It seems generally to have been assumed that the other incidents of the doctrine of reasonable time, as applied in the two cases named, apply also to a receiver; and, among them, that if with a knowledge of all the circumstances he either neglects unnecessarily to communicate his disaffirmance,

or does acts under the contract, he will be held thereafter to have precluded himself, however burdensome the contract may be, from throwing it up. This theory that a receiver is subject to the ordinary rules of election has had several rude shocks during the last ten years, notably in the familiar Wabash Railroad cases (*Quincy R. R. Co. v. Humphreys*, 145 U. S. 82; *Central Trust Co. v. Railroad Co.*, 150 U. S. 287); and also, recently, in Massachusetts (*Bell v. American Protective League*, 163 Mass. 158). The latter case is strong; a receiver, who had retained the lease of certain premises for over a year, with the avowed intention of selling the lease for the benefit of the trust estate, was held not liable for rent after he had finally decided, in defiance of the protest of the lessor, to throw up the lease. In spite of these decisions, however, the old *dicta* have continued to be repeated as regards the duty of electing "within a reasonable time."

A case decided by Judge Jenkins, March 22, 1896, in the Circuit Court for the Eastern District of Wisconsin, *Stewart et al v. Wisconsin Central Co., in re Clybourn Park Company, petitioner* (not yet reported), shows conspicuously, however, how misleading the phrase has become. In this case the petitioner had taken from the railroad company a ten year lease of a tract of land, for the purpose of improving this tract and using it as a picnic ground; and by a covenant of the lease the railroad company bound itself to furnish cars for picnics at the rate of \$17 a car. Receivers were appointed for the railroad company in September, 1893, after the close of that year's picnic season. During the spring of 1894 the receivers made investigations, and it was admitted that by July 2, 1894, they had actually made up their minds to disaffirm the executory portion of the contract, on the ground that it was burdensome to the trust estate. Meanwhile, however, the petitioner had made arrangements for its summer business and was actually conducting picnics, and pending their final decision the receivers had been accepting this business upon the old terms. After making up their minds that the contract ought ultimately to be disaffirmed, the receivers continued to operate under its provisions until the close of the season; and it was not until August 29, 1894, that they first notified the petitioner of their intention to abrogate the \$17 rate. As counsel for the petitioner said at the argument, if the doctrine exists that an election to affirm may be fastened on receivers, independent of the actual intention so to elect, by mere acts done after they have had time enough to decide, it would be impossible to imagine a clearer case for its application; for the "reasonable time" for making a decision must at least have expired when they actually made it; and they acted under the contract for two months more. It also appeared, however, that, so far from being injured by the delay, the petitioner would have suffered considerable loss if notified at any time subsequent to a date when the reasonable time for decision had clearly not elapsed, and that it made profits of several thousand dollars which it would not have made if the receivers had communicated their decision on July 2 or earlier. There was another point in the case upon which the right of the petitioner to equitable relief was denied, on the ground that it did not come into court with clean hands. But the alternative prayer for damages for non-performance of the contract during 1895 was explicitly denied by the court, on the ground that the election to disaffirm made in August, 1894, was a valid election, and terminated the contract.

The court says: "I am inclined to think that under the peculiar circumstances of this case, they [the receivers] cannot be charged with negligent delay, *although the court cannot see that a definite conclusion could not have been sooner reached.* It may be said, however, that the delay. . . . did not in any way operate to the prejudice of the Clybourn Park Company, because the receivers appear to have acted upon very equitable considerations in carrying out the contract during the year 1894, when it appeared that the Clybourn Park Company had made arrangements and entered into contracts for that season; so that the question of time within which the receivers acted ought not under the circumstances *to be deemed unreasonable.*" The last phrase is unfortunate. As used in ordinary cases of election, the criterion of "reasonableness" is whether the party electing has had time intelligently to make up his mind. Having done this, he must notify the other party immediately; he has no farther leeway. The court in the case above cited would have done the profession a service if it had said — what the decision means — that the artificial rule of strict election does not apply to receivers at all. Whether they are bound or not — independently of express election to be bound — is determined by balancing the substantial equities: Has the petitioner been diligent in asserting his rights? Have the receivers misled him to his hurt? Have they made profits out of his property during the time of delay?

A PHYSICIAN'S DUTY OF SECRECY.—Considerable discussion of this topic has been provoked by the case of *Kitson v. Playfair*, fully reported in the *London Times* of March 23d and the days following. This case, however, did not involve the point, for the defendant pleaded privileged communication in an action of libel and slander, and the jury found malice in fact. In a proper form of action the question then is: What right must a plaintiff rely upon to recover from a physician for the disclosure of a professional secret? The nature of the relation between physician and patient seems to be similar to the relation between principal and agent, bailor and bailee. Except for clearness, it is immaterial by what name it is known; whether, as is frequently done in agency, it is spoken of as a status, or whether some other term is applied to it. Under all circumstances, the fundamental nature of the right remains. It does not arise merely from the physician's being a member of society, and is not a duty owed to the public generally, and, therefore, it is not strictly proper to call its violation a tort; nor can it be said to be a duty assumed by contract, for though there may generally be a consideration, consideration is not essential, and when present would be of but slight importance in measuring the duty assumed. The foundation of this duty has very aptly been called an "undertaking." See article on "Gratuitous Undertakings," 5 HARVARD LAW REVIEW, 222. It is one of the recognized rights, so much discussed of late, the breach of which does not belong to either of the great classes of tort or breach of contract.

What is "undertaken" is a question of fact. It is clear that a physician "undertakes" to use that degree of skill which modern practice demands under the circumstances, and also such skill as may reasonably be expected of him from his individual record. Is there more? Does he "undertake" to keep secret whatever he discovers or is told while acting professionally? It would seem so. This is an obligation clearly recognized in the ethics of the profession, and it would seem to be a legal duty

to the patient. Judge Cooley treats a breach of this duty as one of the wrongs in confidential relations (Cooley on Torts, 2d ed., 619). It is submitted that the liability of the physician in *De May v. Roberts*, 46 Mich. 160, must rest on his "undertaking" to act in a professional manner. While it is true that the physician is not privileged from testifying, this does not show there is no legal duty of secrecy, for the law simply does not allow the "undertaking," if it extends so far, to interfere with the ascertaining of truth in a judicial inquiry. It is needless to comment on the oft-attacked rule that physicians and the clergy are not privileged. As long as it exists, however, it must be a good defence for the physician in any action for the disclosure of a communication. The exact limits of this "undertaking" can only be ascertained when the question actually comes up. Whether, as some physicians claim, disclosure can be made as necessity requires, the physician being the judge of the necessity, though the secret is the patient's, will then be determined. In determining this question, it would seem that aid should be sought in the testimony of physicians and others having special knowledge.

INTERPRETATION OF STATUTES — LEGISLATIVE POWERS. — Any decision declaring a statute unconstitutional upon general grounds, with a vigorous dissenting opinion, is likely to awaken general interest. The case of *Commonwealth ex rel. Roney v. Warwick, Mayor*, 33 Atl. Rep. 373 (Pa.), therefore, which sets forth a novel view of the constitutional restrictions on the powers of the legislature, has naturally aroused some discussion. A statute was passed in Pennsylvania directing that certain words in a previous statute, defining the term for which a certain appointee should hold office, should be construed to mean something which they evidently had not previously meant; many years later the question arises as to the length of such an appointee's term; and the court has refused to give the latter statute any effect, on the ground that it was unconstitutional, as an attempt to usurp judicial functions by directing the courts to construe an existing law in a manner contrary to its clear meaning.

This amounts to a decision that all "declaratory" or expository statutes are wholly void, except when there was a real ambiguity in the terms of the previous law. Now the only ground on which such statutes have hitherto been declared unconstitutional has been that they were retrospective in their application. In all the cases cited by the court the question was whether the legislature had power to direct the courts to apply the law as stated by the declaratory statute to transactions occurring before its enactment. And it has been often held that the legislature has no such power; or, if it might conceivably have such a power in some cases, is not to be presumed to intend to exercise it. Even the English courts are reluctant to allow a statute to interfere with rights already vested; and in this country the courts have the advantage of being usually able to find some constitutional impediment. Exceptions are allowed to this rule against giving statutes retrospective application only in certain classes of cases where no vested rights are considered to be involved, besides the cases where the previous statute was really ambiguous, in which cases the legislature's explanation of its true intent is entitled to respect.

There has never been any decision, however, until this Pennsylvania case, that a declaratory statute is not binding on the courts so far as it is

applicable to transactions occurring after its enactment. Such statutes, which are common in many jurisdictions, practically amount to re-enactments of the previous law in amended terms, and are given effect accordingly. It is true that a statute may be objectionable in form which purports to be capable of retrospective application when such an application would be unconstitutional. It by no means follows, however, that it should be held altogether void. Judge Cooley, in a passage subsequent to that quoted by the majority of the court in support of their opinion, makes an important qualification of his objections to declaratory statutes: "But in any case," he says, "the substance of the legislative action should be regarded rather than the form; and if it appears to be the intention to establish by the declaratory statute a rule of conduct for the future, the courts should accept and act upon it, without too nicely inquiring whether the mode by which the new rule is established is or is not the best, most decorous, and suitable that could have been adopted." Cooley on Constitutional Limitations, 6th ed., p. 113.

The objections to declaratory statutes are recognized in the Pennsylvania Constitution of 1874, the provisions of which as to the form in which all statutes shall be passed prevent any statute similar in form to the one in dispute from being now enacted. But that, of course, does not concern an act of 1867. The courts may dislike the form of a statute the provisions of which appear to apply to past as well as future cases, when it would be an unconstitutional usurpation of judicial authority to direct the court to apply them retrospectively. But it would seem that the fairest manner of regarding the statute would be to take it as intended only to apply prospectively. By insisting on their objections to the form of the statute, the court would almost seem, in their zeal against statutes that might be retrospectively applied, to be in effect retrospectively applying the provisions of the Constitution of 1874.

LIQUOR-SELLING BY CLUBS. — Is a social club, which dispenses liquor to its members in the ordinary mode, amenable to the liquor law? The conflict of authority on this point is doubtless due partly to variations in the wording of the different statutes. But even where the statutes are substantially the same, courts have reached the most divergent results. The form in which the question ordinarily arises is this: Does the dealing out of liquor by the steward of a club in response to the order of a member constitute a sale within the meaning of a statute which provides that no one shall sell liquor at retail, to be drunk on the premises, without a license? The New York Court of Appeals has just answered this question in the negative. In *People v. Adelphi Club*, 43 N. E. Rep. 410, it was held that the dispensing of liquors by a social club, which has a limited and select membership, and was organized for a legitimate purpose, to which the furnishing of liquors to its members is merely incidental, is not a sale within the meaning of the law. The weight of authority is in accord with this view. *Commonwealth v. Pomphret*, 137 Mass. 564; *Seim v. State*, 55 Md. 566; *State v. St. Louis Club*, 28 S. W. Rep. 604 (Mo.).

Strictly speaking, it would seem that the transaction amounts to a sale. It can hardly be called a mere division of property belonging to the members of the club in common. The title to the liquor is certainly in the club, and though it is transferred only to members and without expect-

tation of profit, it is difficult to discover any element of a sale that is lacking. If the club is a corporation, this is true beyond the possibility of a doubt. Consequently, many courts have held clubs liable without going further. *State v. Lockyear*, 95 N. C. 633; *State v. Essex Club*, 53 N. J. Law, 99; *People v. Bradley*, 11 N. Y. Supp. 594.

The question, however, is not simply whether there is a sale, but whether there is a sale of the sort the legislature intended to forbid. Much can doubtless be said on both sides of this question. On the one hand, it is urged that as the sale of liquor by clubs is of so different a nature from the ordinary bar-room sale, a statute which is manifestly aimed directly at the latter should not be taken to include the former without express words. Black on Intoxicating Liquors, § 142. On the other hand, it may be contended, perhaps even more forcibly, that, as the language of the statute fits the case so closely, and liquor-selling by clubs is so notorious, the legislature would have expressly reserved it from the operation of the statute if the intention had not been to include it.

In jurisdictions where the former view is adopted, the club, in order to be protected, must of course be a *bona fide* organization with other objects than the mere dispensing of liquor. Courts which take the latter view have often failed to notice this distinction. For example, in *State v. Neis*, 13 S. E. Rep. 225 (N. C.), the court said, "If the gentlemen composing the Cosmopolitan Club of Asheville can be exempted from the liquor tax by the simple device of treating themselves as unorganized tenants in common of a stock of spirituous liquors, and employing an agent to furnish drinks to any members of their club and their friends, by selling at cost, the same can be done by any five hundred or five thousand patrons of a bar-room." This conclusion by no means follows from the premises. If the club is a mere device to avoid the liquor law, it would nowhere be protected. See *Rickart v. People*, 79 Ill. 85.

THE LIABILITY OF A PUBLIC TREASURER. — There is considerable difference of opinion in the cases as to the extent of the liability of a public treasurer. Does the bond ordinarily required of such an official make his liability greater than that imposed by the common law on all fiduciaries? Two recent cases are of interest, as the courts arrive at opposite conclusions on this question after reviewing the authorities. In *State v. Copeland*, 34 S. W. Rep. 427 (Tenn.), on a bond with the usual conditions for faithful performance of duty and for paying over the public money as required, etc., it was held that the official was not liable for a loss not due to any negligence on his part. There is nothing in such a bond to increase the common law liability. In reaching this conclusion the court is strongly influenced by considerations of public policy, especially by the fear that the better class of men will not accept office when doing so involves the assumption of so great a liability. In *Fairchild v. Hedges*, 44 Pac. Rep. 125, the Supreme Court of Washington (one judge dissenting) held that a county treasurer is liable on the undertaking in his bond for money deposited in a bank that fails, though due care was exercised in its selection. While the court thinks this view is in accord with sound public policy, it rests the decision on the terms of the bond.

The two main points on which a difference of opinion is to be found in the authorities are illustrated by these cases. Whatever opinion one may have on the public policy involved in this question, a discussion of it is

out of place here. The court is called upon to construe a solemn instrument, the form of which is prescribed by the legislature, so that there is even less reason for considering public policy than where the bond is given between private individuals. It will not do to say, as was done in *State v. Copeland, supra*, that the bond is merely exacted to obtain the liability of the sureties, as well as that of the principal, which would regularly fall on a fiduciary. The bond is an absolute undertaking, to be void on the happening of the conditions contained in it, and the court has no more power so to construe its nature away than it has to add a condition that it shall be void so long as due care is exercised by the obligor in the discharge of his duties. The law does not concern itself with the extent of the obligation a man chooses to assume, though in imposing a duty upon him it has regard for his capacity. Dufree on Official Bonds, § 197. How strictly the courts taking this view will abide by its logical consequences remains to be seen. In *Fairchild v. Hedges, supra*, a disposition is shown to limit it, as was done in *United States v. Thomas*, 15 Wall. 537, to a liability like that of the common carrier of freight. This, however, does not seem justifiable. Dufree on Official Bonds, § 199. For the four views that have been held on this vexed question, see Mechem on Public Officers, §§ 298 *et seq.*

RECENT CASES.

BILLS AND NOTES — INDORSEE AFTER MATURITY. — The defendant made a note payable to one C. C forged an exact reproduction of this note, and indorsed the forgery after maturity to a third party, to whom it was paid by the defendant in the belief that it was the genuine note. The original note was indorsed after this payment to the plaintiff, who now brings action. *Held*, that he took the note subject to the equities against C, and could not recover. *Leach v. Funk*, 66 N. W. Rep. 768 (Ia.).

This case has no precedent. The court seems wrong in regarding these facts as giving rise to an equity attaching to the note and barring the plaintiff's right. The issue and collection of the forged instrument was an independent transaction, in which the defendant might well base a set-off as against C, but this is not an equity to be available against an innocent indorsee, even after maturity.

CARRIERS — SLEEPING CAR COMPANY — LIABILITY FOR BAGGAGE. — The plaintiff, a passenger in a Wagner sleeping car, on her arrival at her destination, intrusted her hand baggage to the porter to carry to the waiting-room, which was about a hundred yards from the train. A sealskin cape having been lost during this removal, *held* that the sleeping car company is a common carrier of baggage so intrusted to its care, and is therefore liable to the plaintiff for this loss. Ross, J., dissenting. *Voss v. Railroad*, 43 N. E. Rep. 20 (Ind.).

The decision of the majority seems clearly erroneous. The dissenting opinion takes the only tenable position on these facts; namely, that while the sleeping car company's agreement includes assistance to the passenger in alighting, beyond that point the porter cannot bind the company to any liability, much less that of a common carrier. The porter was merely the servant of the passenger.

CONSTITUTIONAL LAW — INTERPRETATION OF STATUTES — LEGISLATIVE POWERS. — An act of 1854 provided that vacancies in certain offices in Philadelphia should be filled by vote of the city councils until the next city election. *Held*, that an act of 1867, providing that the words "next city election" should be construed to mean the election at which a successor would have been elected if there had been no vacancy, was unconstitutional, as seeking to compel the courts to construe the previous act contrary to its meaning. *Commonwealth ex rel. Roney v. Warwick, Mayor*, 33 Atl. Rep. 373 (Pa.). See NOTES.

CONSTITUTIONAL LAW — INTERSTATE COMMERCE — KILLING GAME — SALE OUTSIDE STATE. — *Held*, that the ownership of wild game within the limits of a State,

so far as it is capable of ownership, is in the State for the benefit of all its people in common; and that it is not a violation of the Interstate Commerce clause of the Constitution for a State to prohibit the transportation, outside its limits, of game lawfully killed in the State. Field, J., and Harlan, J., dissenting. *Geer v. State*, 16 Sup. Ct. Rep. 600.

The opinion of the majority is based on the reasoning that, when a State gives one the right to kill game, which it undoubtedly may do, it has the power if it pleases to confer only a qualified ownership in the game, quite different from the perfect nature of ownership in other property. The decision is *contra* to *State v. Saunders*, 19 Kan. 127, and *Territory v. Evans*, 23 Pac. Rep. 115 (Idaho); but owing to the peculiar nature of property in animals *feræ naturæ*, which was overlooked in the two cases *supra*, it seems the more reasonable interpretation of the Constitution.

CONSTITUTIONAL LAW — SELF-INCRIMINATING TESTIMONY. — A federal statute provides that no person shall be excused from testifying before the Interstate Commerce Commission on the ground that his testimony may tend to criminate him; but that no person shall be prosecuted for any transaction concerning which he may testify. *Held*, four judges dissenting, that this is not in conflict with the fifth amendment to the Constitution, which provides that no person shall be compelled, in any criminal case, to be a witness against himself. *Brown v. Walker*, 16 Sup. Ct. Rep. 644. See NOTES.

CONSTITUTIONAL LAW — TURNPIKE ROAD — REGULATION OF RATES. — The charter of a turnpike road company provided that it should be lawful for the company to take certain fixed tolls. There was no reserved power to alter the charter. Later the legislature passed an act fixing uniform rates for all turnpikes in the State, which were less than those fixed in the company's charter. *Held*, latter act valid. Though the charter of a private corporation is a contract, and is within the protection of the clause against impairing the obligations of contracts, yet if the corporation has a public function to perform it is not protected from legislative interference unless the State has clearly indicated in the charter a purpose not to interfere. *Winchester & L. Turnpike Road Co. v. Croxton*, 34 S. W. Rep. 518 (Ky.).

The case is very similar to, but goes a step beyond, *Railroad Commission Cases*, 116 U. S. 307, where a grant of a power to fix charges was held not to prevent the legislature from establishing rates; power was granted only to fix reasonable charges, and the legislature is the judge of reasonableness; the legislature did not intend to surrender its power to fix rates. So, in the principal case, it is a question of the construction of the contract, whether the State meant, by granting the right to charge certain fixed rates, to barter away forever the power to provide reasonable rates. The court's treatment of the case is sound, and the case is a good illustration of the rule that rights not expressly granted by the State are reserved.

CONSTITUTIONAL LAW — VESTED RIGHTS UNDER A CHARTER. — Bill by a stockholder in the Great Northern Railway, to restrain the company from carrying out a contract of consolidation with the Northern Pacific Railway, whereby one half of the capital stock of the latter was to be transferred to stockholders of the Great Northern, and the Great Northern was to guarantee the payment of certain Northern Pacific bonds. The two lines were parallel and competing. The charter given to the Great Northern in 1856 reserved the right of amendment "in any manner not destroying or impairing the vested rights of said corporation." By an amendment in 1865, the railroad was given general power to consolidate with other roads. In 1874 the legislature forbade consolidation with parallel or competing lines; and subsequently to this act of 1874 the contract in question was entered into. *Held*, that so long as the power to consolidate remained unexecuted, it was not a vested right beyond the scope of legislative control, and thus the act of 1874 did not impair the obligation of a contract. *Pearsall v. Great Northern Ry. Co.*, 16 Sup. Ct. Rep. 705.

The case involves a point not covered by previous authorities. The doctrine of the court appears to be that a power in a charter to do certain things which are unnecessary to the main object of the grant, may be treated as a mere license, and revoked by the legislature so long as the power remains unexecuted. The case itself calls for nothing more than a decision that such an unexecuted power does not constitute a vested right within the meaning of the amendment clause in the original charter; however, the very next case in the reporter contains a *dictum* to the effect that, even where the charter contains no clause of reservation, the public nature of railway corporations is such as to subject them to this sort of legislative control. Under its police power, said the court in *Louisville & N. Ry. Co. v. Kentucky*, 16 Sup. Ct. Rep. 715, the legislature "may deal with the charter of a railway corporation so far as is necessary for the protection of the lives, health, and safety of its passengers or the public, or for the security of property, or the conservation of the public interests, provided, of course,

that no vested rights are thereby impaired"; and under the doctrine of the principal case a power to consolidate, while unexecuted, is not a vested right. The decision seems in line with the tendency to limit the scope of the *Dartmouth College Case*, and to give wider range to the so-called police power of the State legislatures.

CONTRACTS — COMPROMISE OF DOUBTFUL CLAIM. — *Held*, that a promise made in consideration of the release by the promisee of a doubtful claim against the promisor is valid, though such claim was not in fact enforceable. *Dovale v. Ackermann*, 37 N. Y. Supp. 959.

It has been held that the release of a doubtful claim is not sufficient consideration to support a promise, where no valid claim actually existed in favor of the promisee. *Gunning v. Royal*, 59 Miss. 45. Such a rule as this would apparently discourage compromise, as each case would be decided in court the same after compromise as before. A better doctrine is supported by the weight of authority, both in England and the United States. According to this modern view, the compromise of a doubtful claim is valid consideration, if the promisee honestly believed that he had a good cause of action. *Cook v. Wright*, 1 B. & S. 559; *Zoebis v. Von Minden et al.*, 120 N. Y. 406; Pollock on Contracts, 2d Am. ed., 182, note (f), collecting authorities. It will be observed that the court, in deciding *Dovale v. Ackermann*, did not directly pass upon the question whether it was necessary that the plaintiff should have honestly believed she had a valid claim; but that she did have such belief appears quite clear upon the facts.

CONTRACTS — CONSIDERATION. — *Held*, that a note without other consideration than the giving up of what afterwards turned out to be a useless certificate of registration, is invalid for want of consideration. *McCullum v. Edmonds*, 19 So. Rep. 501 (Ala.).

In the absence of all fraud, and as a question of law, this decision is *contra* to the weight of authority. Whatever might have been the ruling in equity, the mere inadequacy of consideration, so long as there was some consideration, should not have been gone into by a court of law. The plaintiff was not bound to turn over the certificate, and the mere fact that it was not so valuable as the defendant expected should have no bearing on the case. *Haigh v. Brooks*, 10 Ad. & E. 309, cited with approval in *Wilton v. Eaton*, 127 Mass. 174. See also *Judy v. Louderman*, 29 N. E. Rep. 181 (Ohio), and *Churchill v. Bradley*, 5 Atl. Rep. 189 (Vt.).

CRIMINAL LAW — HOMICIDE — SELF-DEFENCE. — Where one attempted to pass over the land of another, without legal right and at all hazards, and the owner intended to prevent such trespass at all hazards, *held*, that the one attempting to pass without legal right is entitled to take the life of the other in self-defence, he himself having been guilty of no overt act in bringing on the affray. *People v. Conkling*, 44 Pac. Rep. 314 (Cal.).

This decision, although in accord with recent adjudications by the same court cited in the opinion, does not represent the better law. The court seems to put much stress on the generally accepted rule in *Stoffer v. State*, 15 Ohio St. 47, that when a person has been feloniously assailed, and the felon has desisted from his attempt and taken to flight, the right to pursue for private defence ceases as soon as, in the reasonable belief of the assailed, the danger has ceased to be immediate and impending. There is no analogy between the cases. In *Stoffer v. State* the original felonious attack had ceased completely. A reopening of the assault was an entirely new offence, which the deceased undertook at his own risk. But in the principal case the facts seem to be totally different. The trespass was one of a series of continuous acts, which, as was known to the defendant, would in all probability lead up to the taking of life.

CRIMINAL LAW — INTOXICATING LIQUOR — SALE BY SOCIAL CLUB. — *Held*, that the dispensing of liquors by a social club, which has a limited membership, and was organized for a legitimate purpose, to which the furnishing of liquors to its members is merely incidental, is not a sale within the meaning of the liquor law of 1892. *People v. Adelphi Club*, 43 N. E. Rep. 410 (N. Y.). See NOTES.

DAMAGES — CONTRACT — DUTY TO MITIGATE. — In an action for refusal to allow the completion of a contract to haul logs, it was contended that damages should be reduced by proceeds obtainable from other employment during the time necessary to have completed the contract. *Held*, that where the breach is of a contract to do a particular thing not necessarily involving personal services, there is no duty to seek to mitigate damages for the benefit of the delinquent, and if the plaintiff actually does obtain employment the amount of damages is not thereby affected. *Sullivan v. McMillan*, 19 So. Rep. 340 (Fla.).

The case seems to represent the American law. The distinction is taken on account of the impracticability of going into evidence of what the plaintiff might have earned

in different occupations and contracts since the breach. 1 Sedgwick on Damages, 8th ed., § 208. This distinction does not appear to be taken in England. The rule as to the general duty to mitigate damages, stated in *Frost v. Knight*, L. R. 7 Ex. 111, and *Roper v. Johnson*, L. R. 8 C. P. 167, would seem to be contrary to the principal case; as would *Roth v. Taysen*, 12 *The Times*, L. R. 211. But while the English law might not compel the plaintiff to seek other contracts (*Smith v. McGuire*, 3 H. & N. 554, at p. 567), it is quite probable that whatever could be proved to have been gained would be deducted. Mayne on Damages, 5th ed., p. 174.

DAMAGES — TRESPASS TO LAND BY WRONGFUL DEPOSIT. — The defendant, a coal company, dumped refuse on the plaintiff's land, the value of which for agricultural purposes was £200, but for the use made by the defendant about £1000. *Held*, the latter is the true measure of damages, for the defendants would otherwise be qualifying their own wrong. *Whitwam v. Westminster &c. Co.*, 12 *The Times* L. R. 318.

The case is plainly right by the quasi-contractual principle on which it is based, but it is submitted that it may also be supported on the ordinary rule of compensation. The value of the land must be assessed with reference to all the circumstances, among which its availability for disposing of this refuse is one. A leading case on this element of value is *Boom Co. v. Patterson*, 98 U. S. 403.

EVIDENCE — ADMISSIONS. — Defendant was indicted for perjury in having falsely sworn that one Chandler did not commit a certain assault. To prove that Chandler did in fact commit the assault in question, a witness was permitted to testify that Chandler had admitted that he had made the assault. *Held*, that it was error to admit this testimony. *Reavis v. State*, 44 Pac. Rep. 62 (Wyoming).

The testimony admitted was mere hearsay. As the admission of Chandler, it could have been used against him. But the admission was not that of defendant nor of one identified in interest with him, and therefore it could not be used as an admission against defendant. A common interest for or against the existence or non-existence of a particular fact is not an identity of interest in the technical sense of that word. Thus in divorce proceedings the admissions of the defendant that she has committed adultery with the co-respondent, can be used against her, but not against the co-respondent. *Robinson v. Robinson*, 1 Sw. & Tr. 362. There is a seeming absurdity in admitting or excluding certain testimony according as one or another person's interest will be affected by proof of the fact admitted. The explanation of this logical absurdity seems to be that, on grounds of public policy, one is not heard to say that the jury may not take into consideration what he apparently thought was the truth in regard to a material point in the case, even though what he was heard to say could not be used to establish against another that the fact asserted was true. 1 Greenleaf on Evidence, §§ 169-171. *Moriarty v. Railway Co.*, L. R. 5 Q. B. 314.

EVIDENCE — FRAUD — RES INTER ALIOS ACTA. — A made certain false representations to an insurance company, in applying for a policy. The question was whether these misstatements were fraudulent or innocent. *Held*, that the fact that declarations equally untrue in similar respects were made by the same person to two other insurance companies was admissible evidence. *Penn Mutual Life Ins. Co. v. Mechanics' Bank & Trust Co.*, 72 Fed. Rep. 413.

The case is an illustration of a well recognized exception to the rule of evidence which excludes collateral matters from consideration. The facts here pointed to a regular scheme to defraud. In these circumstances, to determine whether one misrepresentation is by accident or by design, others are received to show that such misrepresentation was intentional. Stephen's Digest of Evidence, arts. 11 and 12. One recent case indicates an inclination to reject this sort of evidence. *Commonwealth v. Jackson*, 132 Mass. 16. But the authorities generally favor it. Greenleaf on Evidence, § 53, note *b*. These collateral events must usually be closely connected in point of time with the main transaction. But that a good deal of latitude in this particular may sometimes be allowed is shown by the extreme case of *Mining Co. v. Watrous*, 61 Fed. Rep. 163, in which the occurrences were separated by a period of two years. Earl, J., in *People v. Shulman*, 80 N. Y. 373, note, and Lindley, in *Blake v. Albion Life Assurance Co.*, 4 C. P. D. 94, 106, clearly state what is essential for the reception of evidence of this nature, viz. that such a connection between the acts be established that it is a reasonable inference that they proceed from the same motive.

EVIDENCE — HEARSAY. — In an action against the defendants, as executors of the deceased maker of a promissory note, declarations of the deceased were offered in evidence, in which he had stated that the debt for which this note was given had been paid. *Held*, this evidence was admissible. *Moore v. Palmer et al.*, 44 Pac. Rep. 142 (Wash.).

Dunbar, J., dissented from this decision, and his dissent seems clearly justified. The evidence offered was pure hearsay, coming within none of the recognized ex-

ceptions to the general rule of exclusion. It was a declaration in the deceased party's interest, and should have been rejected. *Reese v. Murnan*, 5 Wash. 373.

EVIDENCE — NEGLIGENCE — "STOP, LOOK, AND LISTEN" RULE. — *Held*, negligence is a question of fact, depending upon the circumstances, and it is not negligence *per se* for one about to cross the tracks of a street railway to omit to look in both directions for the approach of a car. *Cincinnati St. Ry. Co. v. Snell*, 43 N. E. Rep. 207 (Ohio).

While recognizing the rule, apparently well established in Ohio, that one who crosses the tracks of a steam railroad, must, in the absence of a reasonable excuse, look and listen, in order to avoid the imputation of negligence, the majority of the court refuse to extend it to cases of electric street cars. Even in the case of a steam railroad the better view would seem to be that failure to look and listen is properly only *prima facie* evidence of negligence, and the defendant is entitled to have the extenuating circumstances weighed by the jury. *Stackus v. Railroad*, 79 N. Y. 464. *A fortiori*, in the case of the street railway where the company does not own the tracks, and where less agility should be required to avoid the cars when discovered, the hard and fast rule is inappropriate.

INSURANCE — ARSON BY AGENT OF ASSURED. — Where evidence showed that the agent of the assured, having entire management of the business, had caused the destruction of the property by fire, *held*, that as no evidence connected the assured with the arson, the loss was within the perils against which the policy insured. *Feibelman v. Manchester Fire Assurance Co.*, 19 So. Rep. 540 (Ala.).

The case is regarded as law, though apparently decided but once before. *Henderson v. Ins. Co.*, 10 Rob. (La.) 164; 1 Biddle on Insurance, § 442. It is interesting, however, to note that the act of the agent is the same in the principal case as that which constitutes barratry in marine insurance. And while it was always the custom to specify in marine policies that barratry was insured against, — see 2 Phillips on Mar. Ins., §§ 9, 1065, — it was eventually decided that in the absence of such a stipulation barratry was not included among the perils covered by the policy; *Waters v. Merchants' Ins. Co.*, 11 Peters, 213; and the wilful misconduct of servants causing loss of goods upon land has been considered barratry in one case under a marine policy. *Boehm v. Combe*, 2 Maule & Sel. 172. So the law of the two branches of insurance is in apparent conflict.

INSURANCE — INSURABLE INTEREST IN ASSIGNEE OF LIFE POLICY. — *Held*, that a policy of life insurance issued to a person insured is a proper subject of sale and transfer, and is enforceable in the hands of an assignee, though he had no insurable interest in the life of the payee. *Steinback v. Diepenbrock et al.*, 37 N. Y. Supp. 279.

It appears to be fairly well settled that, on grounds of public policy, no one can take out a policy of insurance on a life in which he has no insurable interest. *Greenhood on Public Policy*, 279; *Ruse v. Insurance Co.*, 23 N. Y. 516. There has been considerable judicial conflict, however, on the question whether, after the policy is once issued, it may be assigned to one without insurable interest. The law in New York is pretty clearly in accord with the principal case. *Olmstead v. Keyes*, 85 N. Y. 593. This view has been adopted by other American jurisdictions, and is apparently followed in England. See *Clark v. Allen*, 11 R. I. 439; *Ashley v. Ashley*, 3 Sim. 149. On the other hand, the United States Supreme Court and various State jurisdictions require an insurable interest in the assignee. *Cammack v. Lewis*, 15 Wall. 643; *Warnock v. Davis*, 104 U. S. 775; *Franklin Insurance Co. v. Hazard*, 41 Ind. 116; *Gilbert v. Moose*, 104 Pa. St. 74; *Loomis, Adm'r. v. Life Ins. Co.*, 6 Gray, 396; *Greenhood on Public Policy*, 288. But see *May on Insurance*, 3d ed., pp. 832, 880.

PERSONS — DIVORCE — EFFECT OF SUBSTITUTED SERVICE ON A DECREE AS TO CUSTODY OF CHILDREN. — During proceedings for divorce, the husband, with his two infant children, was absent in a foreign country. Constructive notice had been served on him by publication, and at the trial it appeared that he had simply left the State to avoid the proceedings, and meant to return when the matter was closed. *Held*, by four judges to three, that no decree could be made against the husband as to the custody of the children. *De la Montanya v. De la Montanya*, 44 Pac. Rep. 345 (Cal.).

As to one point, the majority of the court were clearly right; namely, that a personal judgment on constructive service against a non-resident is void, even in the State where it is made. The law has shaped itself into this proposition since the case of *Pennoyer v. Neff*, 95 U. S. 714. The doubtful point in the case seems to be whether a decree as to custody of children may not be made against the husband, when the children have been taken out of the State simply to avoid the divorce proceedings. Leaving aside the question, however, on which the majority and minority differed in this case, as to whether custody of children is a status to be passed on like marriage, it

would seem that, unless the court has the children before it, it has no right to make a decree; for it is the children's interests which must be primarily considered, and this can only be done when the infants are present and adequately represented. See note to *Flint River Steamboat Co. v. Foster*, 48 Am. Dec. 273, and Cooley on Constitutional Limitations, 6th ed., p. 499.

PERSONS — MARRIED WOMEN — DEDICATION BY ESTOPPEL. — In consequence of an agreement with the respondent, a married woman, that she would dedicate part of her land to the public, the complainant, an adjoining proprietor, erected a building on the site of the proposed street. By a statute, a married woman could not convey without joining her husband. *Held*, that a dedication could not be established against the respondent by an estoppel *in pais*. Such dedication must be accomplished by conforming to the statutory requirements, or by a proper conveyance in which her husband is joined. *Vansandt v. Weir*, 19 So. Rep. 424 (Ala.).

This case is undoubtedly correct (*Todd v. Pittsburgh, Fort Wayne & Chicago R. R.*, 19 Ohio St. 514); but there being no misrepresentations, it is hard to see how any question of estoppel arose. Generally speaking, however, where there is no question of tort, a married woman cannot be deprived by estoppel of that which she cannot deprive herself of by her own free will. 2 Bishop on Married Women, Chapter XXXVI.

In Angell on Highways, 3d ed., Chap. III., § 156, the view that there may be dedication by estoppel *in pais* is repudiated, and it would seem with justice. Because a man is estopped by his acts or representations from denying the existence of a way as to three or four persons, it does not follow that he has dedicated this way to the public as a street.

PERSONS — MARRIED WOMEN — POWER TO BIND SEPARATE ESTATE. — A married woman mortgaged her land as security for a loan to her husband. She made no representations at the time of the mortgage that the loan had any connection with her separate estate, and the mortgagee knew in fact that the loan was for the husband's sole benefit. A statute gave the married woman the right "to contract and be contracted with as to her separate property in the same manner as if she were unmarried." *Held*, this mortgage was unenforceable, because not connected in any way with the married woman's separate estate. If she had represented that it was such a contract, she would have been estopped from setting up her incapacity. *American Mortgage Co. v. Owens*, 72 Fed. Rep. 219.

Statutes in terms like the one in this case are common, and the result here reached is in accord with authority generally.

PROPERTY — ADVERSE POSSESSION. — The plaintiff had a remainder in fee in certain land, one Brown being her guardian. This same Brown was the life tenant on whose estate the remainder was expectant. In his capacity of guardian, apparently in ignorance of his own life estate, he attempted to convey by deed a present fee to a third party, which deed now turns out to be void for non-compliance with requisite formalities. The grantee under this deed took possession, and by several mesne conveyances the land came into possession of the defendant, who has occupied it for the period required by statute to bar actions. Brown, the life tenant, died, whereupon the plaintiff brought this ejectment. *Held*, that, notwithstanding the outstanding life estate, the statute had run against the plaintiff. *Nelson v. Davidson*, 43 N. E. Rep. 361 (Ill.).

The court lays some stress on the fact that the deed which gave color to the defendant's adverse possession purported to convey the plaintiff's estate, but nothing would seem to turn on that. If Brown cannot be considered a party to the disseisin, no cause of action accrued to the plaintiff, and she cannot be barred. If the other view is taken, and the plaintiff's estate is being infringed upon, then this decision is a distinct rejection of the doctrine of disseisin by election laid down in *Taylor d. Atkins v. Horde*, 1 Burr. 60, and followed by the later decisions; 4 Kent's Commentaries, §§ 482 *et seq.*

PROPERTY — LANDLORD AND TENANT — SURRENDER BY OPERATION OF LAW. — *Held*, that, where the lessee of a wharf abandoned it, the collection of wharfage by the lessor from a shipper who occasionally used the wharf during the remainder of the term did not operate as a surrender, as such user was not procured by the lessor. *Aberdeen Coal & Mining Co. v. City of Evansville*, 43 N. E. Rep. 316 (Ind.).

The court does not dispute the existence of a surrender where the lessor creates a new tenancy after abandonment by the lessee. *Thomas v. Cook*, 2 B. & Ald. 119, is cited with approval. But, it is said, the collection of wharfage from one who uses the wharf at his own instance merely, does not operate to discharge the lessee from liability to pay rent. It is to be noticed that the doctrine of *Auer v. Penn*, 99 Pa. St. 370, (in which case the landlord re-rented the abandoned premises, to mitigate the lessee's damages, and

notified the lessee that he was not thereby discharged from liability,) was not invoked. And it would seem that the collection of wharfage by the lessor, after the abandonment, apparently on its own account, was as inconsistent with its recognition of the continuance of the lessee's term as the creation of a new tenancy would have been. The correctness of the decision, which depends upon the validity of this distinction, seems at least doubtful.

PROPERTY — MORTGAGES — MERGER — BONA FIDE PURCHASER. — A mortgagee acquired the title to the mortgaged property, and, in the deed by which it was conveyed to him, it was stated that the title was passed "subject to a mortgage of three hundred dollars, which grantee hereby assumes and agrees to pay." *Held*, that it was evident from this that the intention was to continue the existence of the mortgage lien, and no merger ensued; and that exhibiting the unrecorded deed to intending purchasers of the property, combined with the fact that the records disclosed the encumbrance, constituted sufficient notice to such parties of the intention indicated by the clause in the deed. *Mathews et al. v. Jones*, 66 N. W. Rep. 622 (Neb.).

This case is apparently very near the line, but may be supported. It is a general rule of law that a merger takes place when a greater and a lesser estate meet in the same party; but in equity, whenever the legal title becomes united with the equity of redemption, there will be no merger, if such is the intention of the parties. Even, however, where there is an expressed intention, especially if it be vague or doubtful, the courts will presume the intention to be in accordance with the real interest of the parties, and will rule accordingly. *Jones on Mortgages*, §§ 848, 856, 870, 873; per Sir William Grant, in *Forbes v. Moffatt*, 18 Ves. 384. The clause "subject to a mortgage," etc., in the deed, seems to indicate the intention of the parties in the principal case that the titles should be kept separate; and the fact that in Nebraska, as in most of the States, a mortgage is regarded as a lien, and not as an estate in fee, does not apparently affect the rule as to merger. The court would seem to be right too, in holding that the plaintiffs, in obtaining the title to the land, were not *bona fide* purchasers. They certainly had such notice as required them to make further inquiry in regard to the whereabouts of the mortgage and notes, and should have required the mortgagee to produce them before purchasing. *Jones on Mortgages*, § 872. See also *Purdy v. Huntington*, 42 N. Y. 334.

PROPERTY — MORTGAGE — STATUTE OF LIMITATIONS — EFFECT OF REMOVAL. — A executes to B a promissory note secured by mortgage. A then sells the mortgaged property to C. After the statute has run on the note, A renews to B his promise to pay. Later C sells to D. *Held*, the original mortgagor cannot by his second promise affect the rights of D. The latter takes clear of encumbrance. *Cook v. Prindle*, 66 N. W. Rep. 781 (Ia.).

Assuming, as the court does, that when a debt is barred by the statute the mortgage is thereby discharged, the decision seems sound. But this view of a mortgage is quite exceptional. A few of the Western States have adopted it, sometimes owing to the peculiar language of the Statute of Limitations, as in Iowa, and sometimes owing to their conception of the nature of a mortgage, which, they hold, does not convey an estate, but simply creates a lien. Regarded in this light, the mortgage becomes a mere incident to the debt, and when the remedy on the debt is taken away, the mortgage also disappears. *Jones on Mortgages*, 5th ed., §§ 1203, 1204, 1207, discusses the question fully, collecting the authorities and giving the jurisdictions in which the Iowa rule prevails.

PUBLIC OFFICERS — TREASURER'S LIABILITY ON HIS BOND. — *Held*, that a county treasurer is liable for money lost by reason of the failure of the bank in which it was deposited, though due care was used in its selection. *Fairchild v. Hedges*, 44 Pac. Rep. 125 (Wash.). *Contra*, that there is no liability in such a case without negligence. *State v. Copeland*, 34 S. W. Rep. 427 (Tenn.). See NOTES.

QUASI-CONTRACTS — MONEY PAID ON JUDGMENT SUBSEQUENTLY REVERSED. — *Held*, that money voluntarily paid to satisfy a judgment which was subsequently reversed cannot be recovered back, where it appears that the original claim was just, and that the judgment was reversed for a mistake in procedure. *Trasdale v. Stoller*, 34 S. W. Rep. 873 (Mo.).

The case illustrates the equitable nature of this form of action. It is settled that ordinarily one can recover money he has been forced, by levy of execution, to pay on a judgment which is subsequently reversed. *Clark v. Pinney*, 6 Conn. 297; Keener on Quasi-Contracts, 417-419. So when the money has been voluntarily paid. *Lott v. Sweeney*, 29 Barb. 87; *Scholey v. Halsey*, 72 N. Y. 578; but see, *contra*, *Gould v. McFall*, 118 Pa. St. 455. The right of recovery is based on the fact that it is against conscience for the defendant to retain the money. Hence, where, as in the principal case, it ap-

pears that it is clearly not unconscientious for him to retain it, there should be no recovery.

STATUTE OF LIMITATIONS—ORAL PROMISE TO WAIVE.—An enactment provides that, to take a debt out of the Statute of Limitations, an acknowledgment of indebtedness or promise to pay must be in writing. A debtor, being pressed for payment, agrees orally with his creditor, just before the debt is outlawed, that he will waive the defence of the statutory bar in consideration of the latter's forbearance to sue for a certain time. The creditor does forbear for the time requested, and afterwards brings suit. *Held*, the debtor cannot set up the Statute of Limitations as a defence. *Bridges v. Stephens*, 34 S. W. Rep. 555 (Mo.).

Express statutes, similar to the above, requiring written evidence of a new promise to pay by a debtor in order to bind him, have been adopted in many of the States. Such provisions might at first seem to cover the facts of the present case, and to render the oral agreement invalid. But a distinction is to be made between two different kinds of promise. First, there are those which have nothing but the past consideration of an old debt to support them. It was at these that the statute requiring writing was evidently aimed. Promises of the other class have a new and valid consideration, and therefore form part of a complete contract. This was the case in *Bridges v. Stephens*. The consideration was the forbearance of the creditor, and there was in all respects a perfect second contract, which might have been declared on in a separate action. *East India Co. v. Paul*, 7 Moo. P. C. C. 85, 112. It was not for such an agreement that the statute was intended, but only for a bare promise. This seems to be the true *ratio decidendi* in the case. The theory of estoppel put forward by the court is hardly tenable, for there was no misrepresentation by the debtor as to an existing fact, but simply a promise for the future.

TORTS—DECEIT—LIABILITY FOR MISREPRESENTATIONS IN PROSPECTUS.—Where a person has issued the prospectus of a company containing a representation known at the time to be false, and subsequently causes to be published a false representation to the same effect as that of the prospectus, with the intent of inducing persons to purchase shares of the company in the open market. *Held*, he is responsible for the consequences of so doing to any one who, having received a prospectus, purchases shares after allotment on the faith of false representations so published. *Andrews v. Mockford*, [1896], 1 Q. B. 372.

This decision correctly distinguishes *Peck v. Gurney*, L. R. 6 H. L. 377, where it was held that the function of the prospectus in that particular case was exhausted with the allotment. The mailing of the prospectus and subsequent publishing of false information are treated as one continuous fraud. See *Barry v. Croskey*, 2 J. & H. 1.

TORTS—LIBEL—PRIVILEGED OCCASION—STATUTE OF LIMITATIONS.—*Held*, that in an action for libel based on matter in the pleadings of a former suit, brought by the defendant in the libel suit against the plaintiff, the Statute of Limitations did not begin to run until the determination of the former suit in favor of the defendant therein, since otherwise two courts at once might be trying the same issues of fact. *Pardee, J.*, dissenting. *Masterson v. Brown*, 72 Fed. Rep. 136.

This is a most surprising case. In the first place, it runs counter to a rule well settled in the law of libel, that words used in judicial proceedings, relevant to the issue, are absolutely privileged. *Odgers, Slander and Libel*, 187, 191; *Torrey v. Field*, 10 Vt. 353, 414; *Lawson v. Hicks*, 38 Ala. 279. The court's decision on this point is based on *White v. Nichols*, 3 How. 266, but an examination of that case will show that the remarks relied on are *dicta*, the case having arisen on libellous matter in a petition to the President for the removal of an official. Such an occasion is no doubt one of qualified privilege. *Odgers, Slander and Libel*, 226. In the second place, whether or not express malice is a good reply to a plea of the privilege of judicial proceedings, the cause of action is certainly complete at the publication. It is submitted, therefore, that, although a postponement of the libel suit may be desirable, it is at least an inartistic way of effecting it, to say that the cause of action does not accrue until the earlier case comes to judgment.

TRUSTS—PURCHASER FOR VALUE—PRE-EXISTING DEBT.—One Price, having a claim against *The Elmbank* for salvage, made a partial assignment of his claim to the extent of \$1,500 to Cofran, and later another partial assignment of the claim to the amount of \$3,200 to Newman. The assignment to Newman was to secure a pre-existing debt; no agreement was made that the assignment was taken as conditional payment, or that the debtor should be given time. The salvage having been paid into court, Newman, the second assignee, was the first to give notice to the holder of the fund. The fund was not sufficient to pay both Newman and Cofran in full. *Held*, that

Newman was not a purchaser for value, and therefore his prior notice to the holder of the fund did not entitle him to priority. *The Elmbank*, 72 Fed. Rep. 610.

It seems clear on principle that a creditor who takes a thing merely as security for a pre-existing debt gives no value and surrenders no right against his debtor in exchange for the new security given, and therefore that he is not a purchaser for value. Thus, one who takes personal property as security for a pre-existing debt, takes it subject to equities attached to it in the hands of the debtor. *Goodwin v. Massachusetts Loan Co.*, 152 Mass. 189, 199; *Savings Bank v. Bates*, 120 U. S. 556. It is true that, by the prevalent view, one who takes negotiable paper as security for a pre-existing debt takes it free of all equities; *Railroad Co. v. Bank*, 102 U. S. 14; but it seems clear that the cases taking this view must be supported, not on the ground that the holder is a purchaser for value, but on the ground that he has taken negotiable paper—a thing which in many respects is treated as money—in the course of a business transaction, and that he may therefore hold it free of all equities.

REVIEWS.

SELECT CASES FROM THE CORONERS' ROLLS, A.D. 1265-1413, with a Brief Account of the History of the Office of Coroner. Edited for the Selden Society, by Charles Gross, Ph.D., Assistant Professor of History, Harvard University. London, 1896.

The greatest importance of these rolls is historical and chiefly constitutional; and Professor Gross has done well in confining himself, in his excellent and scholarly introduction, to the constitutional position of the coroner, as shown by these rolls and other early authorities. There seems to have been no very close parallel elsewhere to this officer. The English coroner is a curious link between Crown and people. Elected by the people of the county or other local division, the only elective official in the county courts, coming in every case of accidental death and in many others into close relations with the people, he was essentially a popular officer, a product and a proof of local self-government; on the other hand, he was the direct means of accounting to the central government for affairs of every-day life in which it was interested, especially by overseeing the operation of the hue and cry, and by securing for the Crown its deodands and similar rights; and was a check for the King upon the sheriff, though the latter was appointed by the King. No other European nation combined a strong central power with local self-government; and it is therefore not surprising that such an officer was nowhere else found.

Professor Gross brings out clearly this peculiar position of the coroner; he speaks well also of the "four neighboring vills," which seem to have persisted until lately, if indeed they do not still form an administrative group. The Introduction is in fact a valuable essay in English constitutional history.

These rolls have in large measure a quality peculiar to all the English legal rolls; they are a remarkable witness of the common life of the English people in the Middle Ages. No other nation possesses such material for the history of its people. One cannot but be surprised, in reading these rolls, at the number of small children who fell into ditches or wells, or pots of boiling water, or were buried by falling sand-banks; and one may well marvel to find that a three-year old boy "feli into a pan full of milk, and thus was drowned by misadventure" (p. 50). The state of the prisons is vividly set forth in a series of presentments in the cases of seven men who were found to have died in the prison of the castle

of Northampton, within a little more than a year, of cold, hunger, and privation (pp. 79-81). A vivid notion of mediæval student life may be obtained from the presentments growing out of student brawls at Oxford (pp. 87-91).

But though chiefly interesting historically, these rolls, though only records of presentments, contain much of interest to the lawyer. We see here the machinery of appeal in four county courts and the operation of the hue and cry. A man who in felling a tree had accidentally killed a girl, was ordered arrested, because he had not raised the hue (p. 38). Felons abjured the realm before coroners: we have instances here where such a felon, having fled from the highway, was followed by a vill and beheaded as he ran (pp. 37, 76). A survival of a very old form of deodand is discoverable in passages where a well in which a boy had been drowned was ordered closed (p. 42), and a ditch in which a girl had been drowned was ordered filled up (p. 82.) In an interesting presentment it appeared that a man had been wounded in another county, but had died within the hundred where the inquest was held. The inquest was not able to speak of his chattels (p. 74).

This volume is, both in contents and in its editorial work, one of the most satisfactory publications of the Seldon Society. We may properly take pride in the fact that we owe it to American scholarship.

H. B.

HANDBOOK OF THE LAW OF BAILMENTS AND CARRIERS. By William B. Hale, LL.B. St. Paul: West Publishing Co. 1896. (Hornbook Series.) pp. xii, 663.

This new "Hornbook" has the same general characteristics and scope as its predecessors. Meant primarily for students, it loses no value because of the numerous citations of authorities, both English and American, while for the very same reason it is a more satisfactory reference book for the practitioner. Careful study and systematic compilation are manifested throughout the book. Every question is squarely met. Where the decisions are conflicting or unsettled, the author boldly asserts his own views, at the same time explaining the exact state of the law. It is a practical work, for it holds closely to the decisions, and does not present original theories. In fact, to originality the author does not pretend. He acknowledges careful study and frequent use of the works of Judge Story and subsequent writers on bailments and carriers. A comprehensive index has made reference easy. The new "Hornbook" is well worth the room which a lawyer can find for it on his shelves, and will be in demand among law students.

H. C. L.

A TREATISE ON THE LAW OF EMPLOYERS' LIABILITY ACTS. By Conrad Reno. Boston: Houghton, Mifflin, & Co. 1886. pp. xiv, 423.

Though Employers' Liability Acts exist in only four of our States, and two of these acts have been in force for only three years, enough cases seem to have arisen under them to justify a text-book on this practically important subject. The very numerous questions which have arisen in the interpretation of these acts, and the frequent references that must be made to the common law on the subject, although the statutory right of action is distinct from the right at common law, have given Mr. Reno

material for a good-sized volume. Such a book is, of course, useful only to lawyers in the States that have such acts, but to them it ought to be an aid in dealing with this very common kind of case. The work seems to have been thoroughly done; the arrangement is systematic; and there is a full index such as is indispensable in this sort of book. R. G.

A TREATISE ON THE LAW OF GARNISHMENT. By John R. Rood. St. Paul, Minn.: West Publishing Co. 1896. pp. lxxii, 613.

The author's aim has been to produce a volume covering the whole law of garnishment, "fully half" of which "has never been touched upon by any text writer." For those who have one of the former works on attachment, Mr. Rood's book should be a valuable supplement, as the separate treatment of attachment and garnishment has undoubted practical advantages. The work is admirably arranged for the purpose for which it is designed, "to make a book of ready reference in which all the decisions may be found." The text contains a clear statement of the principles of law. The notes are copious, giving the citations, frequently arranged under more detailed statements of the exact principle for which they stand, and, more than that, the quotations from the cases are numerous. All the cases down to the time of publication have been collected, a particular advantage in a work on this branch of the law.

E. S.

HANDBOOK ON THE CONSTRUCTION AND INTERPRETATION OF THE LAWS. By Henry Campbell Black. St. Paul, Minn.: West Publishing Co. 1896. (Hornbook Series.) pp. x, 499.

There was no vacant niche in legal literature to be filled by this book. Undoubtedly the subject is one of great and constantly increasing importance; but the field was already occupied by several works of marked merit. The profession had access to Bishop on Written Laws, Wilberforce on Statutes, Endlich (Am. ed. of Maxwell) on Statutes, and Pomeroy's edition of Sedgwick, to say nothing of other works.

If, however, a new book *must* be published, a worse one than Mr. Black's might easily have been written. The work, as a whole, seems fairly done; and especial commendation is due to section 76, on "The Title"; section 70, on "Adopted and Re-enacted Statutes"; and sections 139 and 140, on "Declaratory Statutes."

A remarkable omission should be noticed. The Table of Cases Cited does not contain either *Riggs v. Palmer*, 115 N. Y. 506, or *Shellenberger v. Ransom*, 47 N. W. Rep. 700 (Neb.); s. c. 59 N. W. Rep. 935; which discuss the question whether the statutes of wills and descent should be construed as allowing a murderer to enjoy a legacy or an inheritance from his victim.

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NEW-FASHIONED RECEIVERSHIPS.

IN the course of the growth of "that system of justice which was administered by the High Court of Chancery in England in the exercise of its extraordinary jurisdiction,"¹ commonly called Equity, a system adopted in this country, and substantially, if not in form, in all our States, and covering three broad heads of jurisdiction, — equitable titles, equitable rights, and equitable remedies, — we find, under the last title, the preventive remedy of the appointment of receivers, in close category with bills *quia timet* and writs of *ne exeat* and of *supplicavit*.²

It is one of the very oldest remedies in the Court of Chancery. The jurisdiction is perfectly familiar and altogether unquestioned.

An approved definition of a receiver is this: An indifferent person between the parties, appointed by the court to collect and receive the rents, issues, and profits of land, or the produce of real estate, or other things in question, pending the suit, which it does not seem reasonable to the court that either party should do, or where a party is incompetent to do so, as in the case of an infant.³

The rhetoric of this definition certainly leaves much to be desired, but we may not look for better, to our professional discredit it must be said. The definition is gleaned and made up from many sources, and may be said to be accepted, if not entirely exhaustive. In addition, the receiver is not the agent or representative of either

¹ Bispham, *Princ. of Eq.*, 1.

² *Ibid.*, 51.

³ *Ibid.*, 51.

or any party, of either defendant or plaintiff, or of any one of many plaintiffs or defendants. He is the officer of the court, its executive hand. The appointment and choice of the receiver resting in the discretion of the court—the sound but personal rather than judicial discretion—are to be made in the interest of all parties or persons concerned or interested in any actual or legal sense.

Naturally and inevitably, with the rise and growth of corporations, receiverships were extended to them, and, chiefly within the last thirty years, railway corporations have not only been subjected to this remedy, but railway receiverships have become by far the most important feature of this branch of equity, especially in the courts of the United States. This application to railways presents some peculiar features. Railways being *quasi* public corporations,—a feature greatly enlarged by our courts within the last dozen or twenty years,—and their business being peculiar and virtually monopolistic, the possession of railways by courts of necessity involves far more than the collection of rents and incomes of lands or the produce of real estate; it involves the management of an intricate, technical, highly specialized business, and the operation of special, and often vast, mechanism and mechanical instruments and appliances. Owing also to the fact that railways are almost always covered by mortgages of differing ranks and kinds, the holders of the mortgage bonds being numerous and widely scattered, the direct pecuniary interests to be affected and served by a receiver of a railway are of the highest and widest importance and interest. The proper result of these and such considerations might well seem to be a high degree of caution and reluctance on the part of courts and judges in appointing railway receivers. Such is the theory, often announced and repeated by courts; but the fact is, as all must concede, that in later days very little heed has been given to this theory, and suitors have asked for and courts have granted the remedy of receivers with a readiness, not to say zeal, which would once have been regarded as scandalous. Not seldom a race has been run between State and Federal courts, and between different State or Federal courts, for possession by receivers of railway properties.

In the definition of a receiver which has been presented must be marked several conditions of the appointment which should be kept in mind. Some of them are these: (1) an indifferent person is to be selected; (2) he is to be the mere hand and agent of the court; (3) he is to be appointed and to hold *pendente lite*; (4) the inter-

ests of creditors, of those whose money has been lent or invested in the property, are the primary interests. These might have been called until recently invariable, and in all but the technical sense jurisdictional, conditions and requirements, especially the condition of a suit pending. And by suit pending was invariably meant a suit between a complainant having some real, direct, individual or official interest which he sought to protect, and the corporation or party which had failed of its legal obligation or duty; for example, a judgment creditor who had exhausted the ordinary means of enforcing his claim, or a holder or holders of bonds secured by a mortgage lien, which the defendant corporation had failed to honor according to the terms of the bond and mortgage, or a trustee or trustees representing the whole body of such bondholders. The suit must of course have been *bona fide* in all respects, and it has been expressly laid down by approved authorities that the conduct of the party applying for a receiver would be looked into by the court, and the court would refuse the relief if the party applying did not show himself free of neglect, collusion, unfair combination, or other legal impropriety;¹ in other words, of legal phrase, did not show clean hands. Courts, and especially judges, differ in judicial manners and methods; but it may be said that the former judicial standard in these respects frowned upon and made highly impolitic any haste, over zeal, or obvious sinister ardor, in seeking the appointment of receivers. The remedy was then regarded as essentially high-handed and extreme, — the absolute wresting away from the hands of its owners of property of such peculiar character, and often of such enormous value; and taking it, to be managed as well as held, by a court through its receiver.

It can hardly be questioned that new ways have come in, and new rules of judicial conduct have obtained vogue, and apparently new principles or conditions of appointment of receivers have been adopted. We do not care to dwell here upon all the considerations which supported what we call the old and conservative view of this point, nor upon all the steps by which a great change has gradually come about. It is enough for our present purpose to direct attention, as we have now done, to what all who are informed know to be a fact.

What we purpose is to notice briefly one startling departure in this regard, — the appointment of receivers of railway companies on

¹ Kerr on Rec., 10.

the application of the companies themselves in advance of any default upon mortgage obligations, and without the presence of other conditions once regarded as essential for the appointment of receivers.

The first important instance of this kind was the well known Wabash case in 1884. The significant and peculiar facts of this case were substantially these. The Wabash railway, being a line consolidated of several originally separate roads, and embracing several thousands of miles of railway, was covered not only by separate mortgages on the separate properties of the original line, but by general mortgages on divisions of the road as they were from time to time organized in the process of growth and consolidation, and finally by a huge general mortgage on the whole consolidated road. A few days in advance of the date of payment of a semi-annual coupon for interest on the bonds secured by the last named mortgage, the Wabash company filed its bill in the United States Circuit Court at St. Louis, averring its inability to pay its next due coupon, and its insolvency; and asking for the appointment of receivers, mainly on the ground that without this remedy the property would be disintegrated. No notice of the application for receivers was given to any bondholders, but only at most to the trustees of the general mortgage. Upon the unopposed motion of the Wabash company, receivers were appointed, who took instant possession of all the properties.¹

It is clear there was here no suit pending, in the sense of the definition already quoted. No relief nor protection was sought by any creditor of the company; no suit was begun by any creditor. The proceeding, so far as it resembled any former proceeding or type of legal proceedings, resembled most an application in voluntary bankruptcy. It could not have been this, because no bankrupt law was then in existence. It was manifestly without precedent, or "peculiar," as was said by the District Judge who administered the case to a great extent: "The case is peculiar in this aspect, that the application was made by the corporation itself, instead of being made by the mortgagee on default of payment of interest."² In point of fact, other requirements and conditions for the appointment of receivers, as stated in our definition, were not observed in this case. (1) The receivers appointed were not indifferent persons,

¹ Up to this point there is no report of this case, the receivers having been appointed at chambers, and no opinion having been given.

² Judge Treat, in *Wabash, &c. v. Central Tr. Co.*, 22 Fed. Rep. 272.

one being closely connected with the former management of the railway as well as deeply interested in it pecuniarily, and bound up in interest with its chief financial promoters and managers, and the other occupying relations hardly less free from objection. (2) The interests of creditors could not have been made the primary consideration in the appointment of receivers, because they were not advised of the application, though the trustees of the latest general mortgage were in point of form advised, but they did not extend the notice to bondholders; and because the persons appointed were not representative of the wishes or interests of the lien creditors of the road, but the friends and choice of those who had managed the road.

It will, therefore, be seen how completely the ordinary conditions were here disregarded. It was plainly the opening of a new chapter. There had previously been one proceeding similar in some respects to the Wabash case in the United States District Court for Connecticut, but only one, and that not a close nor conspicuous precedent.¹

In 1886, the Circuit Court of the United States for the District of Illinois removed the original Wabash receivers from their position as receivers of the lines of railway belonging to the system east of the Mississippi River, and appointed a new receiver for those lines.² In the course of the opinion of the court in this case, it was remarked: —

“It has frequently been deemed necessary, in suits against insolvent railway corporations, to foreclose mortgages, to appoint receivers to operate and protect the property, pending the litigation; but it is unusual and novel, to say the least, to entertain a bill filed *by* such a corporation against its creditors, and at once, without notice, place the property in the hands of one or more of the directors whose management has been unsuccessful. Receivers should be impartial between the parties in interest; and stockholders and directors of insolvent corporations should not be appointed, unless the case is exceptional and urgent, and then only on the consent of parties whose interests are to be intrusted to their charge.”

Upon the application of the receiver appointed by the Circuit Court in Illinois for possession of the lines east of the Mississippi

¹ See, especially, remarks of Judge Treat, in 29 Fed. Rep. 623 *et seq.* No decision of the Supreme Court is named by him, and it is believed there is none.

² *Atkins et al. v. Wab. St. L. & P. Ry. Co. et al.*, 29 Fed. Rep. 161.

River, the District Judge of Missouri entered upon a defence of the action of the court in the original appointment of the Wabash receivers.¹ The court said: —

"It was an application by the corporation itself, concerning which a great deal of comment has been made elsewhere. . . . Here was a vast system, extending through many States and many judicial districts. A default, it was certain, would be made in a few days. What should be done? The interests of all concerned required that some judicial action should be had for the conservation of those interests, — stockholders, bondholders, creditors at large," etc. (pp. 623, 624.)

Again the court said: —

"The simple proposition submitted to the court was this. Here is a vast property, in a bankrupt condition, — whether through mismanagement or otherwise was immaterial to this court. Connected with that property were the rights of stockholders and general bondholders, bondholders under underlying mortgages, general creditors, and, further than that, the duties of these corporations to the public at large, and to the State which granted them their franchises. . . . Their primary obligation was to the sovereign who granted them the franchise. They undertook, *first*, to pay their dues to the government, in the nature of taxes; *second*, they undertook to run a safe operating road, — safe to life and to the transportation of property. Did they do it? Suppose they cannot do it. Then they fall within the judicial administration to compel them to do the best they can. That is all there is in that branch of the inquiry." (p. 625.)

Is not the answer to all this obvious and conclusive, — that it is no part of the duty of courts to protect interests of creditors or of any other persons or parties, or to enforce duties to the State or the public, except upon due and proper application of the parties or the State, made according to the orderly and established modes of legal and judicial procedure? Has a court any more concern than a private individual with the interests of parties or of the State, until such interests are duly presented by the proper parties? Such questions seem to answer themselves. The creditors — stockholders, bondholders, creditors at large, the State or the public — were in no manner before the court when the Wabash receivers were first appointed. If a court may of its own motion assume to represent and act for parties not before it, it is not easy to fix any

¹ Judge Treat, in *Cent. Tr. Co. v. Wab. St. L. & P. Ry. Co.*, 29 Fed. Rep. 618.

limits to its activities or powers. Is not the vista opened by such claims plainly unbounded, as well as portentous? Who could wish to see it entered upon? No conception of judicial duty is more necessary or elementary and fundamental than that the court must await the coming of the proper suitor before exercising its powers. What proper suitor for redress or protection to the property interests of creditors, or to the interests of the State, was before the court when these receivers were appointed? Only the debtor, the defaulting, delinquent corporation, was before the court. Once for all, be it said, courts have no function except to sit still until they are moved by parties having legal rights to assert before them.

This case has been characterized by the most recent authority upon the subject of receivers as follows: —

“It is not only utterly at variance with some of the elementary rules relating to receivers, — as that they can only be appointed in a suit pending, and for the sole purpose of preserving the property in controversy, to await the judicial determination of its ownership and disposition, etc., — but, in its most favorable aspect, it makes receivers mere assignees for the benefit of creditors. That it opens the door to gross frauds upon creditors, by enabling unscrupulous manipulators of railroad property to use the power of the United States courts to stay the hands of creditors in pursuing their lawful remedies, and to carry on the business of the road while schemers force favorable compromises, is manifest. That the discretion of a single judge, however honest and capable, may be successfully invoked, upon the application of an insolvent railroad company, to take possession of its property and operate it for an indefinite period of time, under a system which gives the court control of suits against the company even beyond its own territorial jurisdiction, and suspends the common law right to a jury trial, is startling. It is to be hoped that this decision will not become a precedent.”¹

The same authority also remarks: —

“The appointment of a receiver upon an *ex parte* application before the bill is filed is error, and will be revoked upon appeal, without further considering the merits of the application.”²

Since the *Wabash* case, many like cases have arisen; and it may now be said that the practice is well established; indeed, that under like circumstances it is the almost invariable practice. By this is meant precisely, that when a railway company is in financial straits,

¹ Beach on Receivers, sec. 327.

² *Ibid.*, sec. 106.

or about to be in a case where under the former practice its creditors would be entitled to bring suit to subject its property to a sale for the payment of its debts, and, pending such suit, to ask the appointment of a receiver, the recent practice is for the company itself to anticipate the occurrence of such conditions, and, as the creditors cannot move till they do occur, to seek the court in advance of default, file a petition or bill on its own behalf, and ask the appointment of receivers, usually of its own selection, and almost invariably those most deeply implicated in the past management of the company. We do not recall any important railway recently placed in the hands of a receiver in which this course was not followed; especially our large systems, such as the Atchison and Sante Fé, and the Baltimore and Ohio. In nearly all these cases, if not in all, the former officers, or others intimately concerned in the former management, were chosen as receivers; and, in all cases, those selected in the first instance by the company itself. It cannot yet be said that the practice has received the approval of our highest court. In the litigation of a collateral issue, arising out of the main Wabash case, the Supreme Court of the United States, alluding to the charge of one of the counsel that the bill in the Wabash case was "without precedent," said, "We are not called upon to inquire as to how that may be."¹ But it is certainly true that the practice is actually followed, so far as we know, in nearly all the courts of the United States, as occasions arise.

Some of the results of this practice ought to be noticed, at least in the spirit of inquiry and study. The foremost result, and beyond doubt the result primarily aimed at by this practice, is the keeping of the control of the property and the virtual continuation of the management, in the hands of those who presumably in all cases, and in most cases actually, have brought on the necessity of the receivership. This is certainly a result which calls for a little reflection. In former days such a result was regarded as one to be sedulously avoided. Thus, a distinguished judge used the following language on the occasion of a much pressed motion to appoint as receiver the vice-president of the defaulting railway company, a man of unquestioned integrity and ability:—

"It appeared to the court then, and it does now, that the Chesapeake and Ohio Railroad Company is overwhelmed with debt, secured and un-

¹ Quincy, &c. R. R. Co. v. Humphreys, 145 U. S. 82, 95. See, however, Beach on Rec. sec. 327, note (1).

secured. How it became so, it is not for us to determine. But the court, when called upon to appoint a receiver for a corporation totally insolvent, who is to be the mere servant of the court, upon whose fidelity and ability to manage during the pendency of the suit the property intrusted to him the court must rely, ought not, and ought not to be expected, to appoint a person under whose charge and control the resources of the road had been exhausted and its property seized on execution, and the necessity for a receiver brought about.

"The receiver is not the receiver of the bondholders or secured creditors. He is the mere hand of the court. The unsecured creditors, whose chances of a dividend are remote, have a deep interest in knowing the road, while its assets are being marshalled and its creditors, their claims and priorities, ascertained, is free from the control of those whose administration of its affairs ended in bankruptcy."¹

This example has remained controlling in that circuit, and more recently the same judge said in a similar case, "Unless in cases of imperative necessity, no person will be appointed receiver of a railroad company who is a party to, or of counsel in, the cause, or who has been an officer in, or an official of, the insolvent company."² More recently in the same jurisdiction the eminent and very learned successor of the judge just referred to said, "Under the rule adopted in this court, after careful consideration, this makes him [the proposed receiver] ineligible for the appointment of permanent receiver. The whole question was discussed in *Finance Co. v. Charleston, C. & C. R. Co.*, 45 Fed. Rep. 436, and for this reason alone, against the prejudice of both judges then sitting, Mr. Lord was not continued as receiver. See also *Phinizy v. Augusta & K. Ry. Co.* (decided at this term), 56 Fed. Rep. 273."³

If it is said that courts have it in their power to prevent such a result, the answer is that courts do not, in most cases, prevent it. The essential impropriety and injustice of appointing the former heads and managers of railroads as receivers need not be argued. If there has been mismanagement, such receivers will be interested in covering it up; if there has been favoritism, or any one of a hundred faults of management, such receivers will be likely, if not certain, to continue it. It would seem to be the right of creditors who are in jeopardy, not only to initiate proceedings for the ap-

¹ Judge Hugh L. Bond, in *Richards v. Chesapeake, &c. R. R. Co.*, 1 Hughes, 28.

² *Finance Co. v. C. C. & C. R. R. Co.*, 45 Fed. Rep. 436.

³ Judge C. H. Simonton, in *State Tr. Co. v. Nat. Ld., &c. Co. et al.*, 72 Fed. Rep. 575.

pointment of receivers, but to have the most potent voice in their selection.

But perhaps the gravest question presented is of the legal or judicial wisdom and correctness of allowing an insolvent railroad company, in the absence of a bankrupt law applicable to such cases, voluntarily and against the known and obvious judgment and interests, as is often the case, of the creditors, to transfer the property which was given to secure creditors, and legally belongs to them, into the hands of courts. Interests of creditors may be conflicting; they often or generally are; but is it, under any admissible view, the right of the debtor to put the mortgaged property out of his hands, even into the hands of the court, on his own motion and with no reference to the views of creditors? If we could be certain that courts would see that no undue control of the property was thus obtained, we might still dispute the right; but when we see it resulting in injustice and open scandal, can it be doubtful whether or not the practice is a good or safe practice?

The chief argument or defence of the practice in question offered by courts or railway corporations — the chief ground set up in the bill in the *Wabash* case — is the belief or fear that, if the courts do not seize the properties before default, that is, before the creditors can move, the system or consolidation of lines will be disintegrated, and great loss will thence arise. The first and obvious comment on this is that it would seem to be the concern of the creditors rather than that of the corporation or the courts. The suggestion would appear to be, in fact, a mere pretence, intended to cover designs having no reference to the welfare of creditors.

But if it be true, in such case, that loss will ensue from disintegration, — a matter always open to question, — why not leave the decision as well as its consequences to the creditors? Do railway creditors need tutelage at the hands of the debtor and delinquent company? Are they not generally of a class and character supposed to be rather well fitted and able to care for their own interests? Why not let the default come, if come it must, and leave it unreservedly to those whose interests are largest, and most directly involved, to seek the courts, if they think best, or to keep out of the courts, if they so prefer? Does not the present practice take away their right to freedom of action and judgment in the premises? We merely advance, without answering here, these queries.

The familiar maxim that makes the enlargement of his jurisdic-

tion a mark of a good judge will hardly cover this extension of jurisdiction over such vast interests at the sole instance of the debtor. To amplify is not to seize without due regard to established legal practice, or the sound and usual conditions heretofore regarded as essential. The wishes and views of failing debtors are not good guides for judicial action. As between debtors and creditors under railway mortgages, would not the sound rule for courts be to leave the question of the disposition and handling of the mortgaged properties to be settled outside of courts, as a purely business problem, rather than to allow the debtor to dispose of the pledge before the creditor can exercise any choice or adopt any active policy? In other words, is not the recent practice here discussed as far lacking in soundness of principle as it is fruitful in undesirable results?

It has sometimes been said, on the other hand, that if the debtor company and the creditors both unite in the application for receivers before default, all objection is removed. In such case, on the contrary, does not the chief and fundamental objection remain, namely, that courts of equity have no proper jurisdiction to deal with property or property interests in this summary and sweeping way except when a case of actual default has arisen which gives the right to creditors under the terms of the mortgage to proceed to enforce their remedies as they may themselves be advised at that time? An ordinary railway mortgage expresses the remedies available to the creditors or bondholders, as well as the rights reserved to the debtor. In view of such an express, carefully and mutually guarded contract, is it wise or just or proper, in a legal sense, for courts to do more than aid, as they may be called upon by those asking for such remedies or asserting such rights, in enforcing the contract of the parties? Is the plea of threatened injury, even to all interests, by delaying till default, a good one? Might not courts respond to such applications more safely, and with better results, by reminding both debtor and creditor of the fact of their own free, written contract, and there leave them? Is not any other course open to pretty certain abuse?

D. H. Chamberlain.

NEW YORK, 1896.

THE GROWTH OF TRIAL BY JURY IN ENGLAND.

THE national origin of trial by jury, its historical development, and the moral ideas on which it is founded, have all been discussed by a variety of writers with the acute penetration of philosophical research. The foundation of the institution of trial by jury was not laid in any act of the legislature, but it arose silently and gradually out of the usages of a state of society which has forever passed away. It used to be the generally received opinion at one time that the founder of this institution was Alfred the Great; but this idea has been dispelled of recent years by an enlightened spirit of historical criticism which has been applied to the subject.

Various and conflicting have been the opinions expressed by writers as to the origin of this institution, some writers even considering it a hopeless task to attempt to inquire into its origin. Thus Bourguignon says, *Son origine se perd dans la nuit des temps*. Blackstone, one of our great legal authorities, speaks of it "as a trial that hath been used time out of mind in this nation, and seems to have been coeval with the first civil government thereof," and he adds, "certain it is that juries were in use amongst the earliest Saxon colonies." Du Cange and Hickes were of opinion that it was introduced by the Normans, who themselves borrowed the idea from the Goths. Meyer, in his work on *The Origin and Progress of the Judicial Institutions of Europe*, looks upon the jury as partly a modification of the Grand Assize established by Henry II., and partly an imitation of the feudal courts erected in Palestine by the Crusaders; and he fixes upon the reign of Henry III. as the era of its introduction into England. Reeves, in his *History of English Law*, gives it as his opinion, that, when Rollo led his followers into Normandy, they carried with them this mode of trial from the North. He says that it was used in Normandy in all cases of small importance, and that when the Normans had transplanted themselves into England they endeavored to substitute it in the place of the Saxon tribunals. He therefore speaks of it as a novelty introduced by them soon after the Conquest, and says that the system did not exist in Anglo-Saxon times. Sir Francis Palgrave says

that a tribunal of sworn witnesses, elected out of the popular courts, and employed for the decision of rights of property, may be traced to the Anglo-Saxon times, but that in criminal cases the jury appears to have been unknown until it was established by William I. Mr. Serjeant Stephen says, "We owe the germ of this (as of so many of our institutions) to the Normans, and it was derived by them from the Scandinavian tribunals, where the judicial number of twelve was always held in great reverence." Many eminent writers have strongly maintained that the English jury is of indigenous growth, and was not derived, either directly or indirectly, from any of the tribunals that existed on the Continent. Some others have held that it is of ancient British or Romano-British origin. Others, again, have considered that the Anglo-Saxon compurgators (or sworn witnesses to credibility), the sworn witnesses to facts, the *frith-borh*, the twelve senior thegns of Ethelred's law, who were sworn to accuse none falsely, the system of trial in local courts by the whole body of the Shire or Hundred, contain the germ of the modern jury. Yet, with the exception of what may be termed Ethelred's Jury of Presentment, not one of these supposed origins would be found, if we examined them closely, to possess much more than a superficial analogy to the inquest by sworn recognitors, the historic progenitor of the existing jury.

The theory which presents the fewest difficulties, and which is supported by very weighty arguments, regards the English system of sworn inquests as being derived from Normandy. There, both prior to and subsequent to the cession of the Neustrian province to Rollo by Charles the Simple, it had existed, as in the rest of France, from its establishment under the Carlovingian kings, whose Capitularies contain minute instructions for inquisitions by sworn witnesses in the local courts. But, whatever may be the remote source of this institution, out of which trial by jury grew, two points are at any rate clear. (1) The system of inquest by sworn recognitors, even in its simplest form, makes its first appearance in England soon after the Norman Conquest. (2) This system was in England, from the first, worked in close combination with the previously existing procedure of the shire-moot; and, in its developed form of "trial by jury," is distinctly an English institution. When we attempt to inquire into the origin of an institution which has come down to us from hoary antiquity we must carefully note under what form it appears when for the first time it receives the notice of contemporary writers. This often differs considerably from the form

and character which it assumes in the growth of years. There is one important feature in this institution, and it is this, that its members give their decision under the solemn sanction of an oath; but this feature is not peculiar to this institution, for under the like sanction the *Dicasts* at Athens and the *Judices* at Rome decided. The same rule also prevailed in the old Norse *Thing* and German *Mallum*, where the right of all the inhabitants of the Gau or Mark to be present in the judicial proceedings of these periodical assemblies became in practice limited to a few, as the representatives of the community. But the distinguishing characteristic of the system is that the jury consists of a body of men taken from the community at large, and summoned for the purpose of finding the truth of disputed facts, who are quite distinct from the judges or the court. Their duty is to decide upon the effect of evidence, so that the court may be able to pronounce a right judgment. Twelve men of ordinary ability are just as capable of deciding to-day on the effect of evidence as they were in the infancy of the institution. Although the technicality of the law has increased, yet it in no way interferes with their fitness to decide on the effect of proofs. And this is the reason why the English jury flourishes still in its pristine vigor, whilst the old juries of the Continent have either fallen into decay or been entirely swept away.

No trace of such an institution as a jury can be found in Anglo-Saxon times, for if it had existed distinct mention would have been frequently made of it in the body of Anglo-Saxon laws and contemporary chronicles which we possess, extending from the time of Ethelbert (A. D. 568-616) to the Norman Conquest, but no mention is made.

With respect to criminal trials, we meet, in the ordinance of King Ethelred II. (978-1016), with a kind of jury of accusation, resembling our Grand Jury, and possibly its direct progenitor. In the Gemot of every Hundred, the twelve senior thegns, with the reeve, were directed to go apart, and bring accusation against all whom they believed to have committed any crime. But this jury did not decide the guilt or innocence of the accused; that had to be decided by compurgation or the ordeal. This primitive Grand Jury probably continued in use after the Norman Conquest, until it was reconstituted by Henry II. For more than a hundred years after the Norman Conquest, the ancient Anglo-Saxon modes of trial, or forms of proof, by ordeal (*judicium Dei*), by oath (compurgation, termed later "wager of law"), by witnesses and production of

charters, continued in general use, alongside the Norman procedure, — the wager of battle, and the occasional use of the inquest by sworn recognitors. The Conqueror was doubtless desirous that the English should still continue to enjoy the rights and usages to which they had been accustomed. Consequently we find that the distinctive features of the Anglo-Saxon jurisprudence were retained by the Conqueror. But he made, however, some important changes in the judicial system; he separated the spiritual and temporal courts; he introduced the combat, or duel, as a means of determining civil suits and questions of guilt or innocence; and he appointed justices to administer justice throughout the realm.

It was only by degrees, however, that the advantages of the principle of recognition by jury in its application to judicial matters were realized. The sworn inquest appears to have been at first chiefly used for the determining of non-judicial matters, such as the ascertaining of the law of King Edward, the assessing of feudal taxation under William II. and Henry I., and the customs of the Church of York, which the last named monarch, in 1106, directed five commissioners to verify by the oath of twelve citizens. On one occasion the Conqueror ordered the Justiciars to summon the shire moots, which had taken part in a suit touching the rights of Ely; a number of the English who knew the state of the lands in question in the reign of Edward the Confessor were then to be chosen; these were to swear to the truth of their depositions, and action was to be taken accordingly. But still there are equally early instances of strictly legal matters being decided by the recognition on oath of a certain number of *probi et legales homines*, selected from the men of the county to represent the neighborhood, and testify to facts of which they had special knowledge. Recognition by jury was applied by Henry II. to every description of business, both fiscal and legal.

The primitive German courts were tribunals of fully qualified members of the community, capable of declaring the law or custom of the country, and of deciding what, according to that custom, should be done in the particular case brought before them. They were not set to decide what was the truth of facts, but to determine what action ought to be taken upon proof given. The proof itself was furnished by the oaths of the parties to the suit and their compurgators, the production of witnesses, and the use of the ordeal: trial by battle being a sort of ultimate expedient for obtaining a practical decision, an expedient partly akin to the ordeal as a judg-

ment of God, and partly founded on the idea that, when legal measures had failed, recourse must be had to force. The complainant addressed his charge to the defendant in solemn traditional form; the defendant replied to the complainant by an equally solemn verbal and logical contradiction.

The compurgators, joining their hands, with one voice swore to the purity of the oath of their principal. If the oath was inconclusive the parties brought their witnesses to declare such knowledge as their position as neighbors had given them; the court, having determined the point to which the witnesses must swear, they swore to that particular fact. If the witnesses also failed, the ordeal was made use of. And where the defeated party called in question the sentence thus obtained, he might challenge the decision of the court by appealing to the members of it for a trial by combat. This practice, however common among some branches of the German stock, was by no means universal, and was not practised among the native English.

In these proceedings we find circumstances which, when viewed superficially, appear to be analogous to the later trial by jury; but on closer examination we see that they warrant no such impression. The ancient judges who declared the law and gave the sentence — the *rachinburgii* or the *scabini* — were by no means the equivalent of the modern jury, who ascertain the fact by hearing and balancing evidence, leaving the law and sentence to the presiding magistrate. Nor were the ancient witnesses, who deposed to the precise point in dispute, more nearly akin to the jurors, who have to inquire the truth and declare the result of the inquiry, than to the modern witnesses, who swear to speak not only the truth and nothing but the truth, but the whole truth. The compurgators swore to confirm the oath of their principal, and the only thing they had in common with the modern jury was that they took an oath. Although this is so, yet the procedure in question is a step in the history of the jury: the first form in which the jury appears is that of witnesses, and the principle which gives weight to that evidence is the belief that it is the testimony of the community; even the idea of the compurgatory oath is not without the same element; the compurgators have certain legal qualifications which shall secure their credibility. Beyond this point, modified here as elsewhere by local usages, the Anglo-Saxon system did not proceed. The compurgation, the sworn witness, and the ordeal supplied the proof; and the sheriff with his fellows, the bishop, the shire-thegns, the *judices* and *juratores*, and the suitors of the court declared the law.

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The Normans generally abolished trial by compurgators in criminal cases, and though the trial by ordeal long continued in force, it began to be looked upon as an impious absurdity. In the year 1215, the year of the granting of Magna Charta, the ordeal was abolished throughout Western Europe by the Fourth Lateran Council, which prohibited the further use of that mode of trial; so that trial by jury became unavoidably general in England in order to dispose of the numerous class of cases when the charge was preferred, not by an injured individual against the culprit in the form of an appeal, but by the great inquest of the country (our modern Grand Jury) in the form of a presentment. For it was only where there was an accusing appellant that the trial by battle was possible. But still there was for a long time no mode of compelling a prisoner to submit the question of his guilt or innocence to twelve sworn men, summoned from the neighborhood.

The thirty-ninth section of Magna Charta says: "No free man shall be taken or imprisoned, or disseised, or outlawed, or exiled or anyways destroyed; nor will we go upon him, nor will we send upon him, unless by the lawful judgment of his peers, or by the law of the land" (*nisi per legale iudicium parium suorum, vel per legem terræ*). This has been generally taken as establishing the institution of trial by jury. But such cannot be the case, for the same expression occurs in a compilation of our laws of earlier date than Magna Charta. It is to be found in the *Leges Henrici Primi*. Thus: *unusquisque per pares suos iudicandus est et ejusdem provincie*. Mr. Forsyth, in his learned treatise entitled *History of Trial by Jury*, gives it as his opinion that the *pares* here spoken of have no reference to a jury. He considers that "they may possibly include the members of the county and other courts, who discharged the functions of judges, and who were the peers or fellows of the parties before them." And he goes on to say that, "in a stricter and more technical sense, however, they may mean the homage or suitors of the baronial courts, which had seignorial jurisdiction, corresponding to the hall-motes of the Anglo-Saxons, and in some degree to the manorial courts of the present day. And the words above quoted from the laws of Henry I. were taken by the compiler from the Capitularies of Louis IX. of France, where we know that no such institution as the jury existed until the period of the first Revolution." The "*judicium parium*" of Magna Charta is the enunciation, however, of a general legal principle rather than the technical definition of a mode of trial. "It lay," says Stubbs, "at

the foundation of all German law, and the very formula here used it probably adopted from the laws of the Franconian and Saxon Cæsars."

The use of a jury, both for criminal presentment and civil inquest, is mentioned for the first time in our statute law in the Constitutions of Clarendon. The manner in which the jury is referred to gives one the impression that it was already in common use. The statute declared that "by the recognition of twelve lawful men," the Chief Justice should decide all disputes as to the lay or clerical tenure of land.

By the Assize of Clarendon, it was ordained that in every county twelve lawful men of each hundred, with four lawful men from each township, should be sworn to present all reputed criminals of their district in each county court. The persons so presented were to be at once seized, and sent to the water ordeal. This was simply a revival, in an expanded form, of the old English institution analogous to a Grand Jury, which, as we have seen, had existed at least since the time of Ethelred II.

It was in the Grand Assize (the exact date of which is unknown) that the principle of recognition by jury, having gradually grown into familiar use in various civil matters, was applied by Henry II. in an expanded form, to the decision of suits to try the right to land. This Assize is called by Glanvill, a contemporary and the earliest of our judicial writers, a *regalis institutio*. In it we first find the jury in its distinct form, but the elements of which it was composed were all familiar to the jurisprudence of the time. By the Grand Assize the defendant was allowed his choice between wager of battle and the recognition of a jury of twelve sworn knights of the vicinage summoned for that purpose by the sheriff.

The *Assisa* or *Magna Assisa*, as it was usually termed, was a mode of trial confined to questions concerning (1) the recovery of lands of which the complainant had been disseised; (2) rights of advowsons; (3) claims of vassalage affecting the civil status of the defendant. A writ was then addressed to the sheriff, commanding him to summon four knights of the neighborhood where the disputed property lay, who were, after they were sworn, to choose twelve lawful knights who were most cognizant of the facts (*qui melius veritatem sciant*), and who were upon their oaths to decide which of the parties was entitled to the land. The defendant was also summoned to hear the election of the twelve jurors made by the four knights, and he might object to any one of them. When

the twelve were duly chosen they were summoned by writ to appear in court, and testify on oath the rights of the parties. They took an oath that they would not give false evidence, nor knowingly conceal the truth; and by knowlege, says Glanvill, was meant what they had seen or heard by trustworthy information, and this shows most clearly how entirely they were looked upon as mere witnesses, and how different the idea of their duties then was from what it is now. If they were all ignorant as to the rightful claimant, they testified this in court, and then others were chosen who were acquainted with the facts in dispute. But if some did, and some did not know the facts, the latter only were removed, and others were summoned in their place, until twelve at least were found who knew and agreed upon the facts. If the jurors could not all agree, others were added to the number, until twelve at least agreed in favor of one side or the other. This process was called "afforcing" the assise. The verdict of the jury was conclusive; and there could be no subsequent action brought upon the same claim, for it was a legal maxim that *lites per magnam assisam domini Regis legitime decisæ nulla occasione rite resuscitantur imposterum*. If the jurors were guilty of perjury, and were convicted or confessed their crime, they were deprived of all their personal property, and were imprisoned for a year at the least. They were declared to be infamous, and became incompetent to act as witnesses or compurgators in future (*legem terræ amittunt*), but were allowed to retain their freeholds. From this we see that this proceeding by assise was nothing more than the sworn testimony of a certain number of persons summoned that they might testify concerning matters of which they were cognizant. So entirely did the verdict of the recognitors proceed upon their own prejudgment of the disputed facts that they seem to have considered themselves at liberty to disregard the evidence which was offered in court, however clearly it might disprove the case they had come there to support.

Although twelve was the most usual number of the jurors of assise for some years, it was not the unvarying one. When the institution was in its infancy, the number appears to have fluctuated according to convenience or local custom.

In trial by jury, as permanently established both in civil and criminal cases by Henry II., the function of the jury continued for a long time to be very different from that of the jury of the present day. The jurymen were still mere recognitors, giving their verdict solely on their own knowledge of the facts, or from tradition,

and not upon evidence produced before them; and this was the reason why they were always chosen from the hundred or vicinage in which the question arose. On the other hand, jurymen in the present day are triers of the issue; they base their decision upon the evidence, whether oral or written, brought before them. But the ancient jurymen were not impanelled to examine into the credibility of evidence; the question was not discussed before them; they, the jurymen, were the witnesses themselves, and the verdict was, in reality, the examination of these witnesses, who of their own knowledge gave their evidence concerning the facts in dispute to the best of their belief. Trial by jury was, therefore, in the infancy of the institution, only a trial by witnesses; and jurymen were distinguished from other witnesses only by customs which imposed upon them the obligations of an oath, and regulated their number, and which prescribed their rank and defined the territorial qualifications whence they obtained their degree and influence in society.

Thus we see that the jurors founded their verdict on their personal knowledge of the facts in dispute, without hearing the evidence of witnesses in court. But there was an exception in the case of deeds in which persons were named as witnessing the grant or other matter testified by the deed. And thus an important change was made, whereby the jury, ceasing to be witnesses themselves, gave their verdict upon the evidence brought before them at the trials.

In the time of Glanvill, the usual mode of proving deeds the execution of which was denied was by combat, in which one of the attesting witnesses was the champion of the plaintiff. If the name of no attesting witness was inserted in the deed, the combat had to be maintained by some other person, who had seen or known of the execution. Another mode of proof was by comparing the disputed deed with others admitted or proved to have been executed by the party; but this, which would at the present day be a question for the jury, was determined then by the court.

In reality, however, since jurymen were originally mere witnesses, there was no distinction of principle between them and the attesting witnesses, but gradually in the course of time a separation took place; for although we find in the Year Books of the reign of Edward III. the expression, "the witnesses were joined to the assize," a clear distinction is, notwithstanding, drawn between them. Thus, in a passage where these words occur, we are told that a witness was challenged because he was of kin to the plaintiff; but the objection was overruled, on the ground that "the verdict could not be received

from witnesses, but from the jurors of assise." And it was said that, when the witnesses did not agree with the verdict in an inquest, the defeated party might have an attaint.

The difficulty that was found of procuring a verdict of twelve caused for a time the verdict of the majority to be received. In the time of Edward IV., however, the necessity for a unanimous verdict of twelve was re-established.

In the Year Books of 23 Edward III. mention is made of witnesses being adjoined to the jury to give their testimony, but without any voice in the verdict. This is the first indication of the jury deciding on evidence formally produced in addition to their own knowledge, and forms the connecting link between the ancient and modern jury. As the use of juries became more frequent, and the advantage of employing them in the decision of disputes more manifest, the witnesses who formed the *secta* of a plaintiff began to give their evidence before them, and, like the attesting witnesses to deeds, furnished them with that information which in theory they were supposed to possess previously respecting the matter in dispute. The rules of evidence now became more strict. We find that early in the reign of Henry IV. a still further advance was made. All evidence was required to be given at the bar of the court, so that the judges might be able to exclude improper testimony. From this change two important consequences followed: (1) from the exercise of control on the part of the judges sprang up the whole system of rules as to evidence; (2) the practice of receiving evidence openly at the bar of the court produced a great extension of the duty of an advocate. Henceforward witnesses were examined and cross-examined in open court. Except as regards the right of the jury to found their verdict upon their own private knowledge, the trial was conducted on much the same principles as at the present day. Juries were, however, for a long time entitled to rely on their own knowledge in addition to the evidence. In the first year of Queen Anne the Court of Queen's Bench decided that, if a jury gave a verdict of their own knowledge, they ought so to inform the court, that they might be sworn as witnesses. This and a subsequent case in the reign of George I. at length put an end to all remains of the ancient functions of juries as recognitors. While the jurymen were mere recognitors, if they gave a wrong verdict they must usually have been guilty of perjury. Hence, at common law, they became liable to the writ of attaint. In attaint the cause was tried again by a jury of twenty-four. If the verdict of the sec-

ond jury was opposed to that of the first, the original twelve jurors were arrested and imprisoned; their personal chattels were forfeited to the King, and they became for the future infamous. After the jury became distinct from witnesses, attaint gradually fell into disuse. Besides the legal method of attaint, there was also another and illegal method of punishing a jury for a false verdict, frequently employed by the Tudor and Stuart sovereigns for political purposes. This was by fine and imprisonment by the Court of the Star Chamber. After the abolition of the Star Chamber, the Crown made use of the judges to intimidate juries. At length the immunity of juries was finally established in 1670 by the celebrated decision of Chief Justice Vaughan in *Bushell's Case*.

The institution of trial by jury has thus been traced from the period of its first introduction into England, when the jury acted as mere recognitors, up to the time when they finally became separated from the witnesses, and gave their verdict, not from their own previous knowledge of the disputed facts, but from a consideration of the evidence which was brought before them. An institution like the jury, existing for ages amongst a people, cannot but influence the national character. The very essence of trial by jury is its principle of fairness. The right of being tried by his equals, that is, his fellow citizens, taken indiscriminately from the mass, who feel neither malice nor favor, but simply decide according to what in their conscience they believe to be the truth, gives every man a conviction that he will be dealt with impartially, and inspires him with the wish to mete out to others the same measure of equity that is dealt to himself.

With regard to trial by jury in civil cases, we cannot speak in such high commendation, for it has many and grave disadvantages which prove that it is wholly unsuitable for the settling of disputes in courts of law at the present day. Great changes are required in that institution in order to adapt it to a time which boasts of having reached the highest civilization in the history of the world, and to the necessities of a people whose government, laws, literature, commerce, and social life have scarcely any resemblance to those of their rude ancestors six hundred years ago.

J. E. R. Stephens.

LONDON, 1896.

ACCOUNT OF THE FRENCH SOCIETY OF COMPARATIVE LEGISLATION.

I.

"THE SOCIETY OF COMPARATIVE LEGISLATION," — ITS AIM.

THE Society of Comparative Legislation was founded at the beginning of the year 1869 by a group of scholars and jurists who wished to spread in France the knowledge of foreign laws and to create in Paris a scientific centre for the study of legislation. It received recognition as an institution of public utility by the decree of the 4th of December, 1873. Its headquarters are 44 Rue de Rennes, Paris, in the building of the Society for the Encouragement of National Industry.

The Society "has for its object the study of the laws of different countries and the discovery of practical means of improving the different branches of legislation."¹ "It does not vote on any question."²

II.

CONSTITUTION OF THE SOCIETY.

Admission into the Society is obtained through the Executive Council on nomination by a member.³ The annual assessment is twenty francs.

The Society is composed of French members and foreign members. Every year the Executive Council draws up a list of foreign correspondents, who are exempt from the payment of the assessment.

The Executive Council consists of a President, elected for two years; four Vice-Presidents and sixteen members, elected for four years; a General Secretary, four Secretaries, an indefinite number of Assistant Secretaries, and a Treasurer, elected annually by the Council.⁴ The Council directs the work of the Society, decides as to the admission of new members, supervises the publications, and administers the funds.⁵

¹ Statutes, art. 2.

³ Statutes, art. 5.

⁵ Statutes, art. 11.

² Statutes, art. 4.

⁴ Statutes, art. 7.

Since its foundation the Society has had the following presidents: MM. Laboulaye, member of the Institute, senator (deceased); Renouard, member of the Institute, chief prosecuting officer (*Procureur Général*) at the Court of Cassation, senator (deceased); Dufaure, member of the French Academy, senator, former Keeper of Seals, and former President of Council (deceased); Aucoc, member of the Institute, former Department President in the Council of State; Larombière, member of the Institute, First Honorary President in the Court of Cassation (deceased); Gide, professor in the Faculty of Law in Paris (deceased); Duverger, professor in the Faculty of Law in Paris (deceased); Barboux, advocate at the Court of Appeal of Paris, former leader of the bar; Dareste, member of the Institute, associate justice at the Court of Cassation; Ribot, deputy, former minister, former President of the Council of Ministers; Bufnoir, professor in the Faculty of Law at Paris; Du Buit, advocate at the Court of Appeal of Paris, former leader of the bar; Feraud-Giraud, Honorary President of the Court of Cassation. The President now in office is the distinguished M. Ch. Tranchant, former Councillor of State; for fourteen years the office of General Secretary has been filled by M. Fernand Daguin, doctor of laws, advocate in the Court of Appeal of Paris, who, by his indefatigable devotion and never-failing perseverance, concentrates the forces of the Society and guarantees a regular and fruitful management.

The Society consists at present of more than fourteen hundred members, and increases from year to year. It counts among its numbers those who are most distinguished in the Science of Law, members of Parliament, of the Council of State, of the Faculties of Law, of the bench and the bar, both in France and in other countries.

III.

ORGANIZATION OF WORK IN THE SOCIETY.

As we said above, the Executive Council undertakes the direction of the work which comes within the scope of the Society. It directs and supervises the publications.

For the accomplishment of its work, the active members of the Society are grouped in four sections: —

1. Section of the French language (France, Belgium, Luxemburg, French Switzerland, Canada, Hayti);

2. Section of the English language (Great Britain and Ireland, English colonies, United States);

3. Section of Northern languages (Germany, Holland, Norway and Sweden, Russia, Austria-Hungary, German Switzerland, Servia, Bulgaria);

4. Section of Southern and Eastern languages (Spain, Portugal, Italy, Greece, Roumania, Turkey, Egypt, Spanish America, Brazil, and Japan).

Any member can, if he chooses, take part in the work of any one, or even of all the sections.

The Executive Council appoints annually, from the members of the Society, for each section, a President, two Vice-Presidents, and two Secretaries, all chosen on account of their standing and their qualifications.

Each section meets four times a year. The President at the opening of the meeting reads the list of laws to be noticed or to be translated, and then follows the distribution among the members of the section, whether present or not, to each one according to his special knowledge of the different branches of the law. One, for instance, devotes himself exclusively to questions of commercial law; another to labor questions; a third to maritime law; a fourth to the land laws and mortgages, and so forth. The union of persons of such varied capacities makes the division of labor easy, and the assignment of laws is quickly accomplished. When the distribution is made, the question arises whether all the laws assigned are worth being inserted or translated *in extenso* in the collections published by the Society. Therefore the texts of laws whose importance does not appear at first sight are made the subject of a special report at the next meeting by the member to whom the law has been provisionally assigned. Upon this report, the section votes whether it is a case for insertion or translation in full, or if, on the contrary, it is a case either for a short analysis or a mere mention.

The notice and the translation of the laws being provided for, the President of the section asks the members present for information as to the work on comparative law which they have undertaken or wish to undertake. This work consists of studies on matters of principle which may help the legislature to a solution of divers questions of the day, either in a given country or in all the principal civilized countries. These studies furnish the material for papers read by their authors at a general meeting.

The Society has for this purpose four general meetings a year,

at which the questions raised by the papers presented are learnedly discussed. The discussions are always of the greatest interest on account of the learning and the character of the speakers who take part in them. The first general meeting is always devoted, at least at the beginning, to an address by the President, and to the report of the Treasurer. The proceedings include also, when occasion arises, the re-election of the officers of the Society and the members of the Executive Council. The discussions, as we have already said, are never followed by any vote. To stimulate the work of the members and to guard against any want of initiative, the Society often suggests for investigation certain questions of special interest. Thus at the present time the Society is completing the publication of a series of essays treating of the organization of the bar in all countries, and it has recently proposed as a subject, The Legal Control and Management of Non-business Associations in the Legislation of Different Countries.

A library, comprising more than ten thousand volumes, and composed, for the most part, of works on foreign law, is established at the headquarters of the Society, and furnishes its members with useful material for work. This library is open to persons not belonging to the Society, by permission of the General Secretary.

IV.

WORKS PUBLISHED BY THE SOCIETY.

1. BULLETIN. — The Society of Comparative Legislation has published since its foundation a monthly bulletin. In this bulletin are printed the essays on questions of foreign law, of comparative law and international law read at the general meetings, as well as the report of the discussions raised by these essays. This bulletin contains, besides more extensive papers on comparative legislation, a legislative chronicle of the principal foreign legislative assemblies, and a thorough review of works presented to the Society and distributed by each of the sections to its members. Finally, the bulletin brings to the knowledge of the members of the Society all the facts of internal organization likely to interest them (list and addresses of the French and foreign members; reports of the meetings of sections and the like). A full table of contents ends the December number; the bulletin makes a good-sized volume annually.

2. **ANNUALS.** — Since 1872 the Society has published every year an Annual of Foreign Legislation, and, since 1882, an Annual of French Legislation. The first contains the translation of laws of general interest published annually in foreign countries; the French translation of each law is preceded by a notice and accompanied by notes upon the genesis of the law and former legislation; a general notice on the legislative work of each country, containing chiefly the mention or a brief analysis of laws, which are not sufficiently important to be translated *in extenso*, precedes the separate notices and the translation of the laws of the country in question. The Annual of French Legislation contains the annotated text of the French laws of general interest issued during the year.

3. **VARIOUS PUBLICATIONS.** — The Society, apart from its periodical publications, has published a general treatise on the French and foreign laws relating to aliens, and an analogous work on the Law of Notaries.

4. **FOREIGN CODES.** — Finally the Society has undertaken to publish a translation of the principal foreign codes. The translation of the Austrian Code of Criminal Procedure of 1873, made by MM. Ed. Bertrand and Ch. Lyon-Caen, was printed by order of the government at the National Printing Press, and appeared in 1875. Since then the Committee on Foreign Legislation, established at the Ministry of Justice, has been charged with the official continuation of this work. With this object the Committee has called for the co-operation of the Society of Comparative Legislation, which has provided translators. The Committee in conjunction with the Society has published the following Codes: —

1. The German Commercial Code and German Bills of Exchange Act, translated by MM. P. Gide. Ch. Lyon-Caen, J. Flack, and J. Stourm.

2. Penal Code of Holland, translated by M. W. Wintgens.

3. German Code of Criminal Procedure, translated by M. F. Daguin.

4. German Code of the Organization of the Judiciary, translated by M. L. Dubarle.

5. The Colonial Charters and the Constitutions of North America, translated by M. A. Gourd.

6. Hungarian Penal Code, translated by MM. E. Glasson, E. Lederlin, and F. R. Dareste.

7. German Imperial Code of Civil Procedure, translated by MM. Glasson, E. Lederlin, and F. R. Dareste.
8. English Bankruptcy Act, translated by M. Ch. Lyon-Caen.
9. Portuguese Commercial Code, translated by M. E. Lehr.
10. French and Foreign Copyright Laws, collected by MM. Ch. Lyon-Caen and P. Delalain.
11. Penal Code of Italy of 1889, translated by M. L. Lacointa.
12. Civil Code of the Canton of Zurich, translated by M. E. Lehr.
13. General Code of Personal Property of Montenegro, translated by MM. R. Dareste and A. Rivière.
14. Russian Code of the Organization of the Judiciary, translated by M. J. Kapnist.
15. Scandinavian Maritime Laws, translated by M. L. Beauchet.

V.

INFLUENCE OF THE SOCIETY.

The Society of Comparative Legislation takes part every year in the Congress of Learned Societies organized by the Ministry of Public Instruction. It has been represented by delegates at most of the great international congresses.

In 1889, on the occasion of the twentieth anniversary of its foundation, the Society itself organized a Congress, which was held in Paris and was a marked success.

Finally, the Society has obtained a large number of prizes. At the Philadelphia Exposition in 1876 it was awarded the medal offered by the Centennial Commission of the United States; at the Universal Exposition of Paris in 1878 it obtained a diploma of honor equivalent to a gold medal, and at the Lyons Exposition in 1894 a first prize.

The French Society of Comparative Legislation appeals to jurists throughout the world; scholars, practitioners, legislators, are all interested in its development. By the multiplicity of its publications, every one, whose curiosity is naturally kindled by the extraordinary legislative movement of the present day, is kept in touch with the course of events. The great capacity of the eminent men who direct it and preside over its labors, the ardent zeal of even the humblest of its co-workers, guarantee the quality of the works which are developed under its auspices. Its main object is, by

putting the knowledge of the laws of all countries within the reach of everybody, gradually to bring about uniformity in legislation through the development of the science of law ; this is pre-eminently a work of civilization and of progress, which, as such, commends itself to the attention of the whole world.

Henri Lévy-Ullmann,
Advocate of the Court of Appeal of Paris, Member of the
Society of Comparative Legislation.

PARIS, 1896.

DICEY'S "CONFLICT OF LAWS."¹

AT last we have an adequate treatise on a branch of the law the importance of which to an American lawyer is great and growing.

Some years ago Professor Dicey very successfully dealt with the subject of Domicil, using the rather common English form of rule, comment, and illustration. His work on Domicil is incorporated into this book, and the same method is adopted for treating the whole subject. He has done the work as well as it could be done. The subject perhaps lends itself to such treatment less successfully than evidence, for instance, or torts, because so many of its rules are not clearly determined, and are still subjects of controversy. Full discussion is needed, rather than dogmatic treatment. It is not yet time to formulate the rules governing foreign-acquired rights.

Passing over the form of treatment, however, Professor Dicey's book is highly satisfactory. He has succeeded in a few lines in stating the fundamental principles of his subject better than they have ever been stated before. "The courts, e. g. of England, never in strictness enforce foreign law; when they are said to do so, they enforce, not foreign laws, but rights acquired under foreign laws. . . . The rules as to extra-territorial effect of law enforced by our courts are part of the law of England."² He had already said, still more forcibly,³ "The rules of so called private international law are based on the recognition of actually acquired rights, i. e. of rights which when acquired could be really enforced by the sovereign of the State where they have their origin."

Starting with these principles, Professor Dicey could write, and has written, the best book on the subject. His analysis and arrangement are strikingly novel, and commend themselves entirely; though one may perhaps be allowed to doubt the expediency of treating the great subject of jurisdiction of law under

¹ *A Digest of the Law of England with Reference to the Conflict of Laws.* By A. V. Dicey, Q. C., B. C. L. With Notes of American Cases, by John Bassett Moore. London: Stevens and Sons, and Sweet and Maxwell. Boston: The Boston Book Co.

² Pages 10, 11.

³ 1 *Law Quart. Rev.*, 284.

the rather provincial titles "Jurisdiction of the High Court," and "Jurisdiction of Foreign Courts." The book has, in great degree, the merits of completeness, clearness of arrangement, of thought, and of statement, and enlightened dealing with the authorities; and the crowning quality of a book on this branch of the common law, ability to keep clear of the Continental writers.

Professor Moore's American notes, while not complete collections of the authorities, sufficiently indicate the tendency of the American decisions. One may, however, regret that he has not dealt more fully with the difficult subject of Assignment for Benefit of Creditors.

One hesitates to express a dissent from the conclusions of so generally sound a thinker as Professor Dicey; but this seems a proper time to point out what seems an irrepressible conflict between his general principles and his rules relating to foreign contracts.

The rules on this subject as stated by Professor Dicey are in effect these: "'The proper law of a contract' means the law or laws by which the parties to a contract intended or may fairly be presumed to have intended the contract to be governed."¹ Generally "a person's capacity to enter into a contract is governed by the law of his domicil."² Generally "the formal validity of a contract is governed by the law of the country where the contract is made."³ "The essential validity of a contract is [generally] governed indirectly by the proper law of the contract";⁴ a contract being essentially valid when the law will give effect to it, that is, when it is not forbidden by the law, or made void or voidable by law, as (he says) is the case with a gratuitous promise.⁵ "The interpretation of a contract and the rights and obligations under it of the parties thereto, are to be determined in accordance with the proper law of the contract."⁶ "The validity of the discharge of a contract (otherwise than by bankruptcy) depends upon the proper law of the contract (?)."⁷

To these rules Professor Dicey is driven in his effort to rationalize English cases. Let us see whether they are consistent with his fundamental purpose stated above. The English courts, as has been said, enforce rights acquired under foreign laws. Indeed, Professor Holland has most aptly described the subject as

¹ Rule 143.² Rule 147.³ Page 554.⁷ Rule 150.² Rule 146.⁴ Rule 148.⁵ Rule 149.

"the extra-territorial recognition of rights." If, therefore, a court is to enforce a contract, it must be because that contract has in some state created a legal right. The municipal law, as Professor Dicey rightly indicates (page 4), determines the legal effect of actions which are done within its jurisdiction. Now a contract gives rise to legal obligations, because in the place where the act of contract takes place a legal obligation is created by that act. When two men shake hands in Boston, the law of England is incapable of attaching any legal consequence to their act. There is no law of England where the act is done. The law of Massachusetts is there, ready, if it chooses, to give the act legal significance. If it does not choose, the act is incapable of having a legal significance. No right, in other words, can spring up on the soil of Massachusetts, unless it is created by the laws of Massachusetts. If, therefore, a contract, legally binding, is made in Massachusetts, the law of Massachusetts makes it binding. Now suppose that a contract in Massachusetts requires a consideration; that in Japan a contract does not require a consideration. Suppose two persons in Massachusetts make an agreement without consideration, to be performed in Japan, evidently intending that it shall be governed by the law of Japan, does any legal right arise out of the agreement? It would seem not. Massachusetts law attaches no legal liability to an agreement without consideration: therefore the agreement there made does not become legally binding anywhere. It was not legally binding by the law of Japan because nothing was done within the jurisdiction of Japanese law. Now if no legal right arose in Massachusetts, there is no principle of the Conflict of Laws by which a right could be recognized anywhere else in the world. This is only another way of saying that parties cannot by their own will change the law of the country in which they are. If, for illustration, two men in country A could have their acts judged by the laws of country B, they would have power of changing the law to which they are subject. It seems clear, therefore, on principle, that, whether a legally binding contract has been made can be judged only by the *lex loci contractus*.

By the same line of reasoning it will be seen that the capacity of the parties to make a contract must be judged by the *lex loci contractus*, not by the *lex domicilii*. Suppose a boy of ten, domiciled in a country where he is of age, attempts to make a contract in London, will the law of England annex a legal obligation to his

act? Clearly not. "It is a solecism to speak of that transaction as a contract which cannot be a contract because of the inability of the persons to make it such."¹

The legal effect of a contract, and all matters pertaining to its performance or discharge, and to damages for its breach, should evidently be judged by the law of the country in which they are respectively to take place; that is, by the *lex loci solvendi*. If, for instance, protest of a bill is to be made in France, the law of that country alone can judge whether it has been duly made, for that law alone is present where it is made.

This leaves for Professor Dicey's universal actor, the "proper law of the contract," that is, the law by which the parties intended to be governed, a very subordinate rôle. The intention of the parties, as judged from their acts, here as elsewhere governs the interpretation of the contract, and that alone. If there is doubt as to the legal meaning of language, reference should be had to the law which appears to have been in the minds of the parties.

So much for principle; now let us see which view is supported by authority.

1. Capacity of Parties. Until 1878 the English decisions were all, in accordance with principle, to the effect that capacity to contract was determined by the *lex loci contractus*. In that year the Court of Appeal reversed the judgment of the Probate Division in a matrimonial cause, and in the course of his opinion Cotton, L. J. (for the court) said *obiter*: "It is a well recognized principle of law that the question of personal incapacity to enter into any contract is to be decided by the law of domicil. . . . As in other contracts, so in that of marriage, personal capacity must depend on the law of domicil."² No authority was cited (none but that of Continental writers could have been cited) in support of this statement, and the point had not been argued by counsel. Sir James Hannen, at a later stage of the same case, commented thus on the *dictum*: "I trust that I may be permitted without disrespect to say that the doctrine thus laid down has not hitherto been 'well recognized.' On the contrary, it appears to me to be a novel principle, for which up to the present time there has been no English authority. What authority there is seems to me to be the

¹ Wallace, J., in *Campbell v. Crampton*, 2 Fed. Rep. 417, 423.

² *Sottomayer v. De Barros*, 3 P. D. 1.

other way.¹ . . . If the English reports do not furnish more authority on the point, it may perhaps be referred to its not having been questioned.² He points out that marriage may differ in this respect from ordinary contracts. Mr. Justice Sterling in a later case³ "conceived" that he was "bound by" the *dictum* of the Lord Justice; and Professor Dicey holds the same view. Why a dictum of Lord Justice Cotton should so completely outweigh a dictum of Sir James Hannen, supported by several earlier decisions, is not plain to an American lawyer.

In America the decisions are unanimous in favor of the *lex loci contractus*, though Professor Moore's cautious American note on the passage might not lead one to suppose so.⁴

2. Making of the Contract. It is agreed by all that the formalities required by the place of contract must be complied with; but there is great confusion in the cases as to the rule governing the sufficiency and validity of the consideration, and the legality of the agreement. Several views have been maintained. One view is doubtless that expressed by Professor Dicey, that these matters are governed by that law which the parties intended to govern them. Most of the cases cited by him do not support his contention, but there are no doubt *dicta* to that effect in some of the affreightment cases.⁵ The case, however, on which he most relies, *Hamlyn v. Talisker Distillery*,⁶ is not a case where the creation, but the effect of a contract, was in question. The arbitration clause, as to which the question in the case arose, was part of an English contract, and was performable in England; its legality as an agreement could not have been successfully attacked, nor was the attempt made. Suit was not brought on this agreement in Scotland; it was set up by the defendant in bar of the action, and the question was whether its effect was to oust the Scotch court of jurisdiction. The plaintiff claimed that the "proper law of the contract" was Scotch, and that the court was not ousted; the

¹ Citing *Male v. Roberts*, 3 Esp. 163; *Scrimshire v. Scrimshire*, 2 Consis. 412; *Simonin v. Mallac*, 2 Sw. & Tr. 77; 1 Burge, Colon. Law, 132; Story, Conf. L., § 103.

² 5 P. D. 94, 96.

³ *In re Cooke's Trusts*, 56 L. J. Ch. 637, 639.

⁴ *Saul v. His Creditors*, 17 Mart. 569, 597; *Thompson v. Ketcham*, 8 Johns. 190; *Milliken v. Pratt*, 125 Mass. 374; *Wright v. Remington*, 41 N. J. L. 58; *Swank v. Hufnagle*, 111 Ind. 453; *Baum v. Birchall*, 150 Pa. 164; *Campbell v. Crampton*, 2 Fed. Rep. 417.

⁵ See *In re Missouri Steamship Co.*, 42 Ch. D. 321.

⁶ [1894] A. C. 202. See this case discussed, 9 HARVARD LAW REVIEW, 371.

House of Lords decided, as it must, that the effect of the clause was to be determined by the law of England, where it was agreed that the arbitration should take place. Lord Watson called it a question of interpretation, to be determined according to the intention of the parties;¹ Lord Herschell treated it as a question of the right created.² The case is therefore no authority on the point under discussion.

A second view is that taken by the Supreme Court of the United States, first suggested in usury cases, — that though the contract would be void for usury where made, it would yet be supported if valid where it was to be performed. The choice of law was, however, limited, the contract must be valid either by the *lex loci contractus* or by the law of the *bona fide* place of performance.³ In usury cases this rule was not without considerations to support it, since the usury act of the place of contracting might be said not to forbid payment of a high rate of interest in another State. The rule was, however, extended to cover all cases where the sufficiency of consideration was in question,⁴ and is commonly stated to be that the *lex loci solutionis* determines the sufficiency of the consideration, unless the parties evidently intended the *lex loci contractus* to govern. This rule has been very widely followed in the State courts.

A third view, and the true one, is however held in some jurisdictions of the highest authority; namely, that all questions of consideration are to be determined exclusively by the *lex loci contractus*.⁵ In view of this conflict among the authorities, it seems not improper to insist upon the rule which is unquestionably in accordance with principle.

It remains to consider the authorities upon the interpretation of contracts, the nature of the rights acquired, and matter pertaining to performance, discharge, and breach. On these points there appears to be agreement among all the authorities, the rules suggested above as founded on principle being followed. Thus the interpretation of a contract depends (as to the law governing it, that is, as to the legal meaning of the language) on the intention of the parties;⁶ questions as to the legal effect of acts done under

¹ Page 212.

² Junction R. R. v. Ashland Bank, 12 Wall. 226.

³ Page 207.

⁴ Pritchard v. Norton, 106 U. S. 124.

⁵ Akers v. Demond, 103 Mass. 318; Staples v. Nott, 128 N. Y. 403, 28 N. E. Rep. 515.

⁶ Lord Watson, in Hamlyn v. Talisker Distillery, [1894] A. C. 202, 212; Chatenay v. Brazilian S. T. Co., [1891] 1 Q. B. 79.

the contract depend on the law of the place where they are done,¹ as for instance questions as to the effect upon the title of an attempted assignment of the obligation;² questions as to the nature rather than the existence of the obligation depend usually on the place of performance of it;³ questions of due performance depend on the law of the place of performance;⁴ questions of discharge or postponement of the obligation depend upon the same law;⁵ and so does the amount of damages recoverable on breach of the obligation.⁶

In view of these authorities it would seem possible to insist in the case of foreign contracts upon the fundamental principles so clearly stated by Professor Dicey, and to dissent from his particular rules.

J. H. Beale, Jr.

¹ First Nat. Bank v. Hall, 150 Pa. 466, 24 Atl. Rep. 665; Marvin Safe Co. v. Norton, 48 N. J. L. 410; Thurman v. Kyle, 71 Ga. 628; Vancloef v. Therasson, 3 Pick. 12.

² Williams v. Colonial Bank, 38 Ch. D. 388; Lee v. Abdy, 17 Q. B. D. 309; Hallgarten v. Oldham, 135 Mass. 1.

³ Cox v. U. S., 6 Pet. 172; Hamlyn v. Talisker Distillery, [1894] A. C. 202. Questions as to negotiability or not are governed by the *lex loci contractus*: Ory v. Winter, 16 Mart. 277; Baxter Nat. Bank v. Talbot, 154 Mass. 213, 28 N. E. Rep. 163.

⁴ Rothschild v. Currie, 1 Q. B. 43; Bowen v. Newell, 13 N. Y. 290; Brown v. Jones, 125 Ind. 375.

⁵ Burrows v. Jemino, 2 Stra. 733; Rouquette v. Overmann, L. R. 10 Q. B. 525.

⁶ Gibbs v. Fremont, 9 Ex. 25; *Ex parte* Heidelberg, 2 Low. 526; Fanning v. Gonsqua, 17 Johns. 511. *Contra* in Mass. as to interest: Barringer v. King, 5 Gray, 9.

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On September 2d, 1896, FREDERICK B. JACOBS, A. B., 1889, LL. B. and A. M., 1892, died of consumption at his home at Norwell, Mass. While in the Law School he was an editor of this REVIEW, and up to his death he held the position of Secretary of his Class. He was a man of marked ability, and possessed qualities that endeared him to all who knew him. At a meeting in Boston, September 19th, his Class adopted the following resolution: "We, the members of the Class of 1892 of the Harvard Law School, join in expressing our deep regret at the death of our classmate and friend, Frederick Boyden Jacobs. To those who knew him in college days he was an old and dear friend; to his Law School class a kindly companion and a steadfast fellow student. His work proved him a scholar of high attainments; his energy and capabilities gave promise of much success at the bar, and his strong personality showed above all the man. He had our respect and regard in his life and our sorrow in his early death. We join in conveying to his family our sympathy for their loss, which is ours also."

PHILIP STANLEY ABBOT, who was killed in mountain climbing on August 4th, was one of the most prominent members of the Law School Class of 1893. In the lecture rooms, in the Thayer Club, of which he was clerk, on this REVIEW, of which he was editor-in-chief, he distinguished himself from the first by work which was at once brilliant and sound. He was an interested member of the Phi Delta Phi. The rapidity with which he worked and his unusual energy enabled him to do an unusual number of things and to do them all well. During his course at Harvard College, from which he graduated near the head of his class in 1890, he had shown the same enthusiasm for thoroughness and variety of study and experience, doing equally effective work in his courses, in college journalism, and in philanthropic work. His interest in the theory

of the law grew steadily from the time he entered the School, and but a short time before he died he expressed his satisfaction that the further one went in the practice of the law, the larger faculties it called into action and the less it asked for drudgery. He leaves friends, classmates, who think of him as they do of few other men. The earnestness with which he lived for the best ends, the generosity of his interest in the public good and in the lives of his friends, his ability, his constant buoyancy, his kindness and loyalty, made all believe in his future service to the world, and made his loss to his friends a peculiarly heavy one.¹

THE LAW SCHOOL.—The Law School opened on the first Monday in October, with an entering class somewhat smaller than that of last year. This was expected, as the new regulations as to admission went into effect this fall for the first time. Full statistics will appear in the December number.

Owing to the continued illness of Professor Williston, some changes in the curriculum have been made necessary. Professor Ames has taken charge of Contracts and Bills and Notes, and Professor Beale of Pleading. Mr. Harvey H. Baker, LL.B., 1894, is conducting the course on Partnership. Suretyship has been dropped from the list for this year. According to the announcement made last spring, Mr. Frank B. Williams, instructor in Roman Law in the College, is giving Second Year Property. It is confidently expected that Professor Williston will return during the winter, in which case he will take charge of the course on Bills and Notes for the remainder of the year.

FREE SPEECH VERSUS FAIR TRIAL.—While the notorious Durrant murder trial was pending last spring at San Francisco, a theatrical manager in that city announced the production of a play, manifestly based on the facts of the above case as they had appeared at the preliminary examination. The prospectus showed that the play was of a most sensational character, and the prisoner, claiming that the popular mind would be so inflamed as to render a fair trial impossible, demanded that its production be enjoined. The trial court accordingly issued an order to that effect. On writ of *certiorari*, the Supreme Court of California, in *Dailley v. Superior Court*, 44 Pac. Rep. 458, annulled the order, holding that the constitutional right of free speech must not be hampered by anything in the nature of a censorship.

The California Constitution provides that "every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press." It is often stated that liberty of the press means the right to publish without previous restraint; the court being powerless with regard to writings not yet published. (Story on the Constitution, § 1885.) And the California court held that the right to produce plays at a theatre is no less extensive. Admitting that the presentation of this play might have amounted to contempt of court, and have been punishable as such, the majority of the judges felt convinced

¹ For this obituary notice the Editorial Board is indebted to Mr. Norman Hapgood, a fellow editor and classmate of Mr. Abbot.

that an order not to commit the contempt was an unheard of proceeding; that the prisoner's rights would not be jeopardized, for if the state of public feeling should render an impartial trial impossible, he would be granted a new trial.

Two judges dissented from the majority opinion, contending that the right of free speech should be limited by the constitutional power of the judiciary to insure litigants fair trials; and that while it might be going too far to enjoin the publication of an ordinary libel, a court should certainly be allowed to prevent all interference with the course of justice in a pending trial.

The argument of the dissenting judges seems to lead to the more satisfactory conclusion, and it is certainly a pity if it cannot be reconciled with the language of the Constitution. There is room for much false sentiment on the subject of free speech and other high-sounding natural rights of the freeborn citizen. No one would contend that the right of a man on trial for his life to secure justice should not rank paramount to the right of a theatrical manager to coin shekels by inflaming the popular mind against him. To compel the prisoner to go to the expense of a new trial or a change of venue is an unsatisfactory way out of the difficulty. The public interest may demand that a man shall generally be free to speak his thoughts; it certainly demands that the course of justice shall always run smooth.

THE "NEW WOMAN" IN COURT. — That a woman suing for divorce may be required to pay temporary alimony and solicitor's fees to her husband is the decision of the Circuit Court of Cook County, Illinois, in *Groth v. Groth*, reported in 7 Chicago Law Journal, 360. The *ratio decidendi* is, that, where changed circumstances bring a case within the reason of an old rule, the rule must be applied, though what seems a novel result is thereby attained.

It can hardly be questioned that the law administered in the Ecclesiastical Court of England, what may be called the common law of divorce, is law in this country. 1 Bishop, Mar., Div. & Sep. § 133. Temporary alimony was allowed in *North v. North*, 1 Barb. Ch. 241, without a statutory provision. The result then in the principal case is undoubtedly correct if the old ground for compelling the payment of alimony now exists in the woman's case as well as the man's. Bishop states as the reason for allowing it in the Ecclesiastical Court, "that the marriage has taken from the wife her property and vested it in the husband, leaving her when acting apart from or adversely to him in poverty." 2 Mar., Div. & Sep. § 922. This ground does not exist to-day in most jurisdictions, but the wife's right to temporary alimony in a proper case is too firmly established to be denied. If, then, as the court says, the wife "has been placed on an equality with her husband in respect to her personal and property rights," common fairness requires that it should be allowed to the husband too, and such a result is justifiable on the theory advanced by the court. While strict construction is the rule when a statute is in derogation of the common law, repeated legislation on a subject imbues the judges with the spirit of the change. So that ultimately, when questions come up which are not within the letter of the statutes, this effect is apparent in the manner in which they are treated. *Smart v. Smart*, [1892] A. C. 425, is an instance of this. At page 435 of the opinion, Lord Hobhouse does not hesitate to say that this is

done. It is to be noticed that in the principal case stress is laid on the Illinois statute, making a married woman equally liable with her husband for necessities furnished to the family, provided she has a separate estate. This undoubtedly made it easier for the court to render the decision they did, but it is only one of the many statutes the spirit of which must be regarded.

There may readily be a difference of opinion as to whether the spirit of the laws so far enacted does justify the decision in the principal case. It may well be said that up to the present time statutes have merely sought to protect the wife from the power of her lord and master. However, so much has been justly said against the fairness of modern legislation, as removing woman's disabilities without imposing upon her the corresponding burdens, that it is rather refreshing to see this very legislation instrumental in imposing the "burdens" with a vengeance.

"GOLD CLAUSE" CONTRACTS. — The demand in the platform of one of our political parties that Congress enact legislation to prevent the demonetization of any kind of legal tender money by private contract, has occasioned some discussion as to the legal efficacy of "gold clause" contracts. Are contracts for money payable specifically in gold coin of the United States enforceable? Can Congress by retrospective legislation make nugatory such contracts already in existence?

As the law now stands, the answer to the first question is in no doubt. In *Bronson v. Rhodes*, 7 Wall. 229 (1868), the United States Supreme Court declared that a bond payable in gold and silver coin of the United States could not be satisfied by a tender of United States legal tender currency of the same nominal amount as the face of the bond. The *Legal Tender Cases*, 12 Wall. 457 (1870), established the validity of such a tender to discharge an antecedent debt payable in money generally, on the ground that such a contract contemplated payment in what was lawful money at the time of payment and not at the time of contracting. The court carefully guarded itself against overruling *Bronson v. Rhodes* (see 12 Wall. at p. 548), and a year later reaffirmed this latter decision in *Trebilcock v. Wilson*, 12 Wall. 687 (1871), where it explicitly declared the Legal Tender Act not applicable to contracts payable in other specific forms of money. A recent United States decision, *Woodruff v. Mississippi*, 162 U. S. 291, 16 Sup. Ct. Rep. 820, has been occasionally cited to the contrary during the past summer by careless writers. The court here, however, decided that the true construction of the contract made it payable, not in gold coin, but in money generally, so the point in question did not arise. 162 U. S. at p. 302, 16 Sup. Ct. Rep. at p. 824. At present, therefore, there can be no difficulty in enforcing "gold clause" obligations.

Nor is it probable that any act of Congress designed to destroy the effect of gold contracts already made would be held constitutional. The Fifth Amendment to the Constitution prohibits the United States from depriving any person of life, liberty, or property without due process of law. Retrospective legislation that impairs vested rights is a deprivation of property without due process of law within this prohibition. *Cooley*, Const. Lim., 6th ed., 431, 443; *Westervelt v. Gregg*, 12 N. Y. 202; *Strubel v. Ry.*, 12 Wis. 67; *Taylor v. Porter*, 4 Hill, 140, 145. What is meant by due process of law? "Undoubtedly a pre-existent rule of conduct, declarative of a penalty for a prohibited act; not an *ex post facto* rescript

or decree made for the occasion. The design of the convention was to exclude arbitrary power from every branch of the government; and there would be no exclusion of it, if such rescripts or decrees were allowed to take effect in the form of a statute." Gibson, C. J., in *Norman v. Heist*, 5 Watts & Serg. at p. 173. The holders of obligations payable in money of a specified kind may rely with tolerable certainty upon the protection of the United States Constitution, whatever may be the will of Congress.

CITATION OF AMERICAN CASES IN ENGLAND. — The part which American decisions ordinarily play in the English courts is so insignificant that it is surprising to find one of them actually mentioned in the head-note of an English case. The reporter's syllabus of *Kennedy v. Trafford*, [1896] 1 Ch. 763, contains these words: "*Van Horne v. Fonda*, 5 Johns. Ch. [N. Y.] 388, not followed." And the opinions of the judges show that the case figured prominently in the discussion. The incident called forth a spirited editorial in the Solicitors' Journal of June 13th, in which the writer protested strongly against allowing "English principle to be stifled by foreign competition," and quoted Lord Halsbury's remarks in *Re Missouri Steamship Co.*, 42 Ch. D. 321, 330: "We should treat with great respect the opinion of eminent American lawyers on points which arise before us, but the practice, which seems to be increasing, of quoting American decisions as authorities, in the same way as if they were decisions in our own courts, is wrong." Of course indiscriminate indulgence in the practice deplored by the learned Chancellor might well be frowned on by the English Bench. But Lord Halsbury certainly did not have in mind such an instance as this. *Van Horne v. Fonda* is the starting point of a peculiar and well established American doctrine. An English court, called upon for the first time to decide a point involving that doctrine, would hardly be performing its duty adequately if it ignored the leading American case.

A NEW PHASE OF THE RIGHT TO PRIVACY. — When a right is as vague and undefined as the right to privacy, to consider novel actions brought, as showing tendencies and possibilities in its development, has as much a place in current discussion as to comment on the actual decisions of the highest courts. The bringing of such a suit based on the right to privacy is noticed in 30 American Law Review, 582. A mother took her infant to a hospital, where it was operated upon in her presence before medical students. The suit is brought for the child by its next friend against the surgeon, who performed the operation. Two grounds are stated as infringements of its right to privacy, first, the publicity of the operation, and, secondly, the publication of a pamphlet containing a scientific account of the operation and illustrated by photographs taken for the purpose. Fictitious initials were used to conceal the child's identity.

Without going into the question of consent in this case, the important point is whether on such facts the right to privacy has been infringed at all. The difficulty to be met by the trial judge is at once apparent, when it is considered that no definition of this right has been given that can aid him, nor does any seem possible as yet. Its extent must be determined as cases come up by a process of elimination rather than definition. See Messrs. Warren and Brandeis' article, 4 HARVARD LAW REVIEW, 194.

The simplest way would seem to be to employ a process of elimination in the charge to the jury. Let the judge start with a clear case of liability, and work toward a clear case in which there is no liability, in such a manner as to bear on the facts of the question before the jury. In this way could be obtained the elasticity considered in the article referred to as essential in any rule of liability. To start with a clear case, then, suppose the persons brought in by the surgeons were prompted to come by idle curiosity merely. Can the line be drawn between that case and one where the on-lookers are medical students? Desirable as it is to do so, what is the difference between the two acts that warrants the distinction? Under the influence of the modern scientific spirit a fundamental difference is felt, which makes one act seem wanton, while the other can only be regarded with approval. In the latter case there can be no *injuria* if the law is to protect right-minded persons in their right to privacy without encouraging squeamish plaintiffs. This is not to assert a right to study a person's case, however interesting, against his will, express or implied. It is merely to say that one who is rightfully taken into the operating room of a hospital is not to be presumed to object to that which is regularly done there.

As to the second ground on which the action is based, it is a truism to say that unless the patient's identity is in some way connected with the published description there is no infringement of the right to privacy. It is the same question that arises in the law of libel.

RIGHT OF A BENEFICIARY TO SUE ON A CONTRACT. — *LAWRENCE v. FOX* AGAIN. — The anomalous doctrine that "whenever one makes a promise to another for the benefit of a third person, the latter may maintain an action at law upon such a promise," has received another severe blow in New York; *Lawrence v. Fox*, 20 N. Y. 268, the weightiest authority to be found in its favor, has been again distinguished, and sharply restricted. In *Buchanan v. Tilden*, 39 N. Y. Supp. 228, the defendant had agreed with the plaintiff's husband, in consideration of valuable services rendered to defendant in a lawsuit, that if the defendant should win the suit he would pay to the wife fifty thousand dollars. The defendant won his suit, and the wife brought this action on the contract in her own name. The court refused to allow her to recover, and distinguished *Lawrence v. Fox*, quoting from the opinion in *Vrooman v. Turner*, 69 N. Y. 284, to this effect: "The courts are not inclined to extend the case of *Lawrence v. Fox* to cases not clearly within the principle of that decision. Judges have differed as to the principle on which *Lawrence v. Fox* and kindred cases rest, but in every case in which an action has been sustained there has been a debt or duty owing by the promisee to the party claiming to sue upon the promise." The opinion subsequently proceeds: "This and similar cases that might be cited, in which *Lawrence v. Fox* has been distinguished, will show that that case has been sharply criticised and its scope materially limited, and that the tendency of the decisions is to adhere to the rule of the common law that one cannot acquire rights under a contract to which he is not a party." The court then holds that, while the husband was bound to support his wife, he was not bound to make her a present of fifty thousand dollars, and therefore the case need not follow *Lawrence v. Fox*.

The idea that some other person than the promisee can maintain an

action upon a promise, solely because he is beneficially interested in its performance, seems now in a fair way to lose the influence which it has had in some of our State courts. Long ago the English courts repudiated it, the United States and the Massachusetts courts have practically denied it, and now a New York court has refused to apply it any further than it can help. (See 8 HARVARD LAW REVIEW, 93; 9 *id.* 233.) In the common case of a promise by a bank to a depositor to pay his checks, even courts which fully accept *Lawrence v. Fox* will not support an action by the check-holders against the bank, though they are certainly legal creditors of the promisee. (See 9 HARVARD LAW REVIEW, 539.) There is, to be sure, a considerable class of cases where the purchaser of mortgaged land has assumed to pay off the mortgage debt; and the courts have allowed the mortgagee to enforce the payment of the debt by such a purchaser. Of this sort is the recent case of *Solicitors' Loan and Trust Co. v. Robins*, 54 Pac. Rep. 39 (Wash.), in which, however, there is a vigorous dissenting opinion. But whenever relief is given in these cases, it ought to be upon purely equitable grounds; as is declared in the opinion in *Keller v. Ashford*, 133 U. S. 610, cited as the leading authority in *Trust Co. v. Robins* (*supra*), which expressly denies that the right of the mortgagee under certain circumstances to take advantage of an obligation entered into by a purchaser of the mortgaged property results from any legal right of the mortgagee to sue on a contract the discharge of which would be for his benefit. See also on this point *Green v. Stone*, 34 Atl. Rep. 1099, a recent New Jersey case.

LIBEL INVITED BY THE PLAINTIFF. — That one who procures the publication by another of a libel to his agents, for the purpose of making it the foundation of an action, cannot recover, is a well established rule of law. It has been recently reaffirmed by the Supreme Court of New York. *Miller v. Donovan*, 39 N. Y. Supp. 820. In that case, which is a good type of the class in question, the plaintiff having learned that the defendant had in his possession a libellous letter concerning him, sent to the defendant agents, who, by means of false representations, induced the defendant to read the letter to them. A conclusion not only in accord with the authorities, but also of evident soundness and rectitude, should rest on definite and substantial grounds. Yet Giegerich, J., who delivered the opinion of the court, while intimating that the occasion was privileged, supported the decision chiefly on the broad but uncertain basis of apparent justice. The opinions, too, in the few earlier cases on the subject, in all of which the same result has been reached, have not strength either in agreement with one another or in sufficient reason severally. Such a state of the authorities is not satisfactory.

The view taken by the judges in the earliest cases was that publication to the plaintiff's agents was, in truth, merely communication to the plaintiff himself, and that consequently there was no publication. *King v. Waring*, 5 Esp. 15; *Smith v. Wood*, 3 Camp. 323. The difficulty with this is that it puts a purely fictitious meaning on the word "publication." One is an agent without losing his identity, and a communication is made not only to the agent, but also to the thinking and reasoning being. Besides, if the "no publication" theory is adopted, how are cases where there has been a previous unprivileged publication to be dealt with? It has several times been held that where the defendant had spoken slanders,

and the plaintiff before beginning suit sent a person to the defendant to investigate, and the latter repeated the slanders, the plaintiff could recover on the basis of the communication to his agent. For, as was pointed out by Lord Denman, it would be absurd to give the defendant extra rights when the plaintiff took a reasonable precaution. *Griffiths v. Lewis*, 7 Q. B. 61; 14 L. J. Q. B. 199. This, which is undoubtedly the present law, effectually does away with the "no publication" idea, as far, at least, as the authorities are concerned. *Duke of Brunswick v. Harmer*, 14 Q. B. 185; 19 L. J. Q. B. 20; *Gordon v. Spencer*, 2 Blackf. 286. Where the plaintiff was the first at fault, that is, where, as in the principal case, there had been no previous publication, the later decisions hold the occasion to be privileged. *Warr v. Jolly*, 6 Car. & P. 497; *Howland v. Blake Mfg. Co.*, 156 Mass. 543. On principle, this view seems scarcely more satisfactory than the older and discredited theory. Privilege to communicate imports the notion of a right like that of self-defence. Yet, in these cases, the defendant does not speak as of right; for if he knew of the circumstance which according to the courts gives him the privilege, namely, that his listeners are the plaintiff's agents, he would not speak at all.

Would it not be better for the law to admit the existence of the constituents necessary to make a technical libel, and deny the plaintiff relief on the ground that *volenti non fit injuria*?

LIABILITY OF A LUNATIC FOR NEGLIGENCE.—The case of *Williams v. Hays*, which has been appearing in various New York courts at irregular intervals during the last two years, and which probably has not even yet been finally decided, is remarkable for the human as well as legal interest that attaches to it. The facts of the case are refreshingly unusual. The defendant, who was one of several joint owners in a vessel, contracted with his co-owners to sail her under certain conditions, not necessary to be here detailed, but which, the court decided, made him not an agent but a charterer, or owner *pro hac vice*. On a voyage south the vessel met with severe storms, and her captain, the defendant, for more than two days was almost constantly on duty. Finally, becoming exhausted, he went to his cabin. The mate who had been left in charge, having found that the rudder was broken, went down for the captain and brought him on deck. The latter refused to recognize that the vessel was in danger, and declined the aid of two tug-boats, the masters of both of which offered to tow him to safety. In consequence, the vessel drifted on shore in broad daylight, and became a total wreck. The assignee of the rights of the company that insured the vessel brought suit. The defendant captain's sole defence was that from the time he entered his cabin till he found himself in the life-saving station he was totally unconscious and insane.

In November, 1894, the case came before the Court of Appeals squarely on the question: Is one, insane by act of God, liable for torts of negligence? By a bare majority, the court decided in the affirmative, but added: "If the defendant had become insane solely in consequence of his efforts to save the vessel during the storm, we would have had a different case to deal with. He was not responsible for the storm, and while it was raging his efforts to save the vessel were tireless and unceasing, and if he thus became mentally and physically incompetent to give

the vessel any further care, it might be claimed that his want of care ought not to be attributed to him *as a fault*. In reference to such a case, we do not now express any opinion." *Williams v. Hays*, 143 N. Y. 442. After a new trial, this reserved question came before the Supreme Court, which held that, applying the principle stated by the Court of Appeals, it could make no possible difference how the defendant became insane, or "what caused the disease or mental condition that prevented him from exercising the care or skill that he was bound to exercise." *Williams v. Hays*, 37 N. Y. Supp. 708.

The position of the Supreme Court is undoubtedly logical and necessary. If the general rule holds liable one rendered insane by act of God, it would require an unwholesome exercise of ingenuity to make an exception in favor of one rendered insane by extra and commendable effort. The proposition laid down by the Court of Appeals, on the other hand, seems hardly defensible. It is a subject on which there is a wide disagreement of the authorities (see 10 HARVARD LAW REVIEW, 65), and which therefore may well be settled in the pure light of reason. The Court of Appeals rested its decision on two grounds. First, that public policy required that a lunatic should be liable, which view appears to be largely fanciful; and second and chiefly, that "where one of two innocent persons must bear a loss, he must bear it whose act caused it." This last proposition clearly belongs to the doctrine of absolute liability, which was never to be defended with adequate reason, and which is now generally discredited. Even the Court of Appeals, in the principal case, while laying down a rule of absolute liability showed an unwillingness to stand squarely on such a doctrine by reserving opinion on a possible phase of the case before them. A theory, the advocates of which are forced to striking inconsistencies, does not commend itself to reason. The modern and enlightened view is thus stated by Beven, Vol. I. p. 52, 2d ed.: "Liability for trespass is not absolute and in any event, but dependent on the existence of fault." (Also *Brown v. Kendall*, 6 Cush. 292. Holmes on the Common Law, 77, *et seq.*) If blame or fault is indeed the basis of liability in tort, how can one blamelessly and totally insane be liable for the consequence of his negligence? To hold that he is, certainly is a step in the wrong direction.

RIGHT TO SUPPORT OF LAND.—A distinction of some delicacy, that might occasionally prove important to land-owners, is discussed in the case of *Cabot v. Kingman*, 44 N. E. Rep. 344 (Mass.). A city dug a ditch in a street to lay a sewer. Lying a little below the surface and extending under the abutting land were beds of fine sand, which were so full of water that as the latter flowed into the ditch it carried quantities of sand with it; and this sand was taken out by the pumps along with the water. The withdrawal of the sand caused the abutting land to subside; and the owners brought an action for the damage. The court allowed the plaintiff to recover, holding that he had a right, to the support of the particles of soil which the defendant had removed, no matter how the latter had done so. A strong minority, however, held that the plaintiff could not complain of the withdrawal of the flowing quicksand. Now, not only is it settled that a man cannot complain of his neighbor for withdrawing percolating water from under his land (*Chasemore v. Richards*, 7 H. L. Cas. 349), but, what is more to the point, it has been held in

England that he cannot complain of the loss of support of underground water, whether collected in a body (*Northeastern Ry. Co. v. Elliot*, 1 J. & H. 145), or dispersed through the soil (*Popplewell v. Hodkinson*, 4 Exch. 248), though the damage be directly caused by the acts of his neighbor. On the other hand, it is established that he is entitled absolutely to the support of the soil under him, even though it be so soft that a neighbor digging on the adjoining land is obliged to take extraordinary precautions to keep it from falling away. *Gilmore v. Driscoll*, 122 Mass. 119. The question then is whether the courts are to liken this sort of quicksand to soil or to water. It seems at first to be rather soil than water; but when it is considered that the essential distinction between earth and water for the purpose of such a case lies rather in the liquidity of the latter than in its chemical composition, it may be doubted whether the minority of the court was not right in treating everything that could be taken up by pumps as water.

A CHURCH DIVIDED AGAINST ITSELF. — In the case of *Smith v. Pedigo*, 44 N. E. Rep. 363, and 33 id. 777, we have the practically unanimous opinion of the Supreme Court of Indiana on the interesting question as to whether a church may change its doctrine and yet keep the property that has been given it. An unincorporated religious society was known as the "Mt. Tabor Regular Baptist Church," and held property given to it by that name, the title being vested in trustees elected by the society. The members were originally all "Regular Baptists," holding the strict Calvinistic, or "anti-means," doctrine of salvation. Religious controversies arising, a majority of the members turned to the opposite or "means" doctrine, and changed the name of the church to the "Mt. Tabor Means Baptist Association."

The society was then divided into two factions, each of which declared itself the true Mt. Tabor Baptist Church, expelled the other faction, elected trustees, and claimed the church property. One faction had the majority of the old society, but new doctrines and a new name. The court held that the minority who adhered to the old doctrines and name were entitled to the church property. The cases cited by the court, though not perfectly clear, appear to support this view; and probably the weight of authority is in its favor. Yet the question may well be considered doubtful. In Massachusetts during the early part of the century a great number of churches turned from Trinitarian to Unitarian, and kept the church property, against the vigorous protests of faithful minorities. The Indiana court seems to have misapprehended two of the cases arising out of this religious revolution, *Baker v. Fales*, 16 Mass. 488, and *Stebbins v. Jennings*, 10 Pick. 172, which they cite in support of their opinion. These cases really decide only that a minority of the "church," i. e. a smaller body of communicants contained within the whole body of pew-holders constituting the religious society or "congregation," might appoint the trustees to hold the property for the benefit of the majority of the congregation, disregarding a majority of the "church-members," who had withdrawn from the congregation. In both cases, however, the people who kept the property were the Unitarians, and the protesting "church-members" were the Orthodox Trinitarians. If any doubt had been entertained as to the right of the majority of the congregation to alter its doctrine or its name, the possession of the property

would have been bitterly contested. But no such doubt occurred to Massachusetts lawyers.

On principle it would seem desirable that a religious society in a country of religious equality should be allowed to change its faith without losing its property. It is of course true that, if property be given in trust for the support of certain doctrines, it ought not to be used by those not entertaining such doctrines, and a court of equity may be forced to undertake the difficult task of defining what doctrines the donors intended to support, and just how far the trustees may deviate therefrom. But it need not be implied that property left to a church under a denominational name was intended to be used only to forward the doctrine which the church then held. Would it not be wise to consider the property as left to the church for such religious and charitable uses as it might think best, always having regard to the donor's express declaration? This whole matter is well threshed out in *Hale v. Everett*, 53 N. H. 9-276, in a very long opinion against the heretical majority of the church, and a still longer and very able dissenting opinion by the late Chief Justice Doe, then Associate Justice.

RECENT CASES.

AGENCY — VICE-PRINCIPAL RULE. — *Held* (three judges dissenting), that the head of a section squad on a railway is not a vice-principal when his negligence in managing a brake causes injuries to a hand working under him. The vice-principal doctrine recognized. *Northern Pac. Ry. Co. v. Peterson*, 16 Sup. Ct. Rep. 843.

The decision sustains the better view of the vice-principal doctrine, that superiority of position does not constitute the relation, but that it exists only where a manager is in charge of a department acting for the principal. But the case is interesting as showing a change of view in the Supreme Court toward the vice-principal theory itself. The theory was recognized in *Ry. Co. v. Ross*, 112 U. S. 377; qualified in *Ry. Co. v. Baugh*, 149 U. S. 368; and all but repudiated in *Ry. Co. v. Hamby*, 154 U. S. 349, and *Ry. Co. v. Keegan*, 160 U. S. 259.

BILLS AND NOTES — BILL RAISED BY FILLING IN BLANKS — EFFECT OF NEGLIGENCE OF ACCEPTOR. — L. accepted a bill for £500 bearing a stamp sufficient to cover a bill for £4,000, and with blank spaces upon it which were afterwards fraudulently filled up so as to make the bill read as one for £3,500. In that condition it was negotiated to the plaintiff, who took it in good faith and for valuable consideration. *Held*, the acceptor was liable only for £500 on the bill. *Scholfeld v. The Earl of Lonsborough*, 12 *The Times* L. R. 604.

The ultimate ground of this decision in the House of Lords is that the defendant was not in fact guilty of negligence in accepting the bill in the condition in which it was when brought to him, but the Lord Chancellor proceeds vigorously to attack the doctrine of *Young v. Grote*, 4 Bing. 253, that one who facilitates forgery by another affects the validity of the instrument forged as against himself, which doctrine he traces to the civil law. "I am not aware," says the learned Chancellor, "of any principle known to the law which should attach such consequences to a written instrument when no such principle is applicable in any other region of jurisprudence where a man's own carelessness has given opportunity for the commission of a crime. A man, for instance, does not lose his right to his property if he has unnecessarily exposed his goods, but could recover against a *bona fide* purchaser of any article so lost, notwithstanding the fact that his conduct had to some extent assisted the thief." That the principle is not known in any other region of jurisprudence would not seem fatal to its existence as a part of the law of negotiable paper, founded as it is upon the custom of merchants. That some degree of care should be required of one who helps into existence an instrument intended to circulate from hand to hand as money seems self-evident. If one can with impunity create an instrument of such a kind that it presents an obvious opportunity to a dishonest holder of effecting a fraud, it is a serious diminution of the usefulness of negotiable paper, in so far as it tends to hamper its free circulation.

BILLS AND NOTES—GUARANTY OPERATING AS INDORSEMENT.—The payee of a negotiable note indorsed it: "I guaranty the within note, waiving notice of protest and demand." *Held*, that these words operated as an indorsement and not as a mere assignment. *Dunham v. Peterson*, 67 N. W. Rep. 293 (N. Dak.).

The view taken seems to be that the guaranty over the signature in no way prevents the signature from operating as an indorsement; that the writer is "an indorser with enlarged liability." The difficulty with such a view is that the signature is affixed to and really forms part of the guaranty, and a guaranty is not a negotiation of a note. See *Tuttle v. Bartholomew*, 12 Metc. 454; *Trust Co. v. National Bank*, 101 U. S. 68. The latter decision also indicates that under so unusual a form of transfer, if it be assumed to be valid, the transferee should not take free from equitable defences possessed by the maker.

CARRIERS—INVALID TICKET—EJECTION.—A passenger bought an excursion ticket to A, which on its face read that in order to be good for the return trip, it must be stamped by an agent at A. No agent could be found by the passenger, and so he tendered the unstamped ticket for his return passage. Upon the conductor's declining to accept it, he refused to pay fare, and was put off. *Held*, he could not recover in trespass for his ejection. *Western Maryland R. Co. v. Stocksdale*, 11 Atl. Rep. 880 (Md.).

The decision seems sound. A recent Indiana case, however, in which the facts were almost identical with the above, reached the opposite result. But the doctrine of the Maryland case has the weight both of principle and authority in its support. 9 HARVARD LAW REVIEW, 353; *Hutchinson's Law of Carriers*, 2d ed., § 580 A. Strong considerations of policy favor the rule, now pretty generally recognized, that a ticket is a formal contract, and that the conductor is justified in basing his action upon its express terms, regardless of any explanations to the contrary by the holder. If this be the correct view, there was no wrong in the ejection. The passenger could and should have avoided it by simply paying his fare, which he would subsequently recover from the railroad. Selling him an imperfect ticket was the company's real wrong, and for this he has his appropriate remedy.

CARRIERS—LIABILITY FOR BAGGAGE.—The defendant company received the baggage of the plaintiff, having been misled by the act of a third party into the belief that the plaintiff was going to take passage over their line. The plaintiff in fact went by another route, his baggage being lost by the negligence of the defendant while in transit. *Held*, that since the defendant intended to receive the baggage only as baggage accompanying the passenger and without other charge, they did not receive it as common carriers, that their duty of care was less than that of any class of bailees, and that their negligence in this case was not so gross as to entail liability. *Beers v. Boston & Albany R. R. Co.*, 34 Atl. Rep. 541 (Conn.).

No authority in point is cited in support of this decision and it seems at least questionable. No matter how mistaken the defendant was, a voluntary bailee of the baggage for transportation and on full knowledge of the facts could have demanded freight and have retained the goods under a lien for payment. *Hutchinson on Carriers*, §§ 1, 19. This being so, they owed a carrier's duty to the owner of the goods, and should be held liable for their loss.

CONSTITUTIONAL LAW—ABILITY OF CONGRESS TO PAY DEBTS FOUNDED ON MORAL CONSIDERATIONS.—*Held*, the Act of Congress appropriating a certain sum to sugar manufacturers who would have been entitled to bounties under the Tariff Act of 1890, had it not been repealed in 1894, is valid and constitutional, irrespective of the constitutionality of the original bounty provision. *United States v. Realty Co.*, 16 Sup. Ct. Rep. 1120.

The case is interesting, aside from its containing a summary of sugar legislation, as showing the nature of debts which Congress is authorized to pay. Such debts include not only claims of such a nature as to be legally enforceable against an individual, but also moral obligations founded on equitable or honorable considerations. Assuming the unconstitutionality of the provision authorizing the payment of sugar bounties, yet there is such an honorable obligation on the part of the government towards those who, in good faith altered their position in reliance upon that act, that an appropriation for their benefit is to be regarded as the payment of a "debt" in a moral and equitable sense. In deciding whether the facts of a given case bring it within the class of obligations founded on moral considerations Congress must be its own judge, and its decision can rarely if ever be reviewed by the judiciary.

CONSTITUTIONAL LAW—FREEDOM OF SPEECH.—The performance of a play, based on the facts of a murder case on trial will not be enjoined, such action being in violation of the constitutional provision as to freedom of speech and of the press. *Dailey v. Superior Court*, 44 Pac. Rep. 458 (Cal.). See NOTES.

CONSTITUTIONAL LAW — INCRIMINATING TESTIMONY. — *Held*, that, where an executive pardon is granted as a matter of practice to accomplices who give full evidence in the prosecution of their fellows, the equitable right to this does not affect the constitutional privilege of a witness not to incriminate himself by his own testimony. *Ex parte Irvine*, 74 Fed. Rep. 954 (Ohio).

This case proceeds on the reasoning of *Counselman v. Hitchcock*, 142 U. S. 547, that the proffered pardon was not sufficiently broad in its scope to protect the witness fully from the many consequences resulting from his testimony which the constitutional provision was intended to cover. No reference is made to the later case of *Brown v. Walker*, 16 Sup. Ct. Rep. 644 (see note, HARVARD LAW REVIEW, June, 1896), which reaches a contrary decision on facts hard to be distinguished but more resembling the present case.

CONSTITUTIONAL LAW — NOTARIES PUBLIC — APPOINTMENT OF WOMEN. — *Held*, that under the 4th Amendment to the Constitution of Massachusetts, providing that notaries public shall be appointed by the Governor in the same manner as judicial officers are appointed, i. e. by and with the advice and consent of the Council, the legislature cannot confer power upon the Governor and Council to appoint women to that office. 43 N. E. Rep. 927 (Mass.).

This is an extension of the doctrine laid down in the opinion of the judges in 150 Mass. 586, that under the same amendment a woman could not be appointed a notary public in the absence of any legislation upon that subject. In both instances the opinion is based upon the ground that, at the time of the adoption of the amendment (1821), the nature of the office and custom of appointment to it were such that it could not have been intended that women should fill it. The question presented here is one of the construction of the Constitution in view of the common law at the time of its adoption, and a similar opinion prevails in some other States. Its grounds are purely historical, and not of the philosophic character of the arguments of Mr. Justice Bradley in *Bradwell v. The State*, 16 Wall. 130. Had this amendment been adopted in these later days, it would seem doubtful if the court would hold that the common law was unchanged in view of the great numbers of women so generally appointed notaries in the Western States. The legislation in Massachusetts admitting women to the bar, and a later statute providing that such women as had qualified as attorneys might be appointed special commissioners to take depositions, together with the repeated requests of the legislature for opinions as to the constitutionality of appointments of women to the office, indicate an inclination of the community to grant to women at least some of the most important powers attaching to the office. It would seem as if the other powers of a notary could be similarly conferred by other statutes without the necessity of a constitutional amendment for which as yet no vigorous demand has arisen.

CONTRACTS — DAMAGES — PROSPECTIVE PROFITS — PREVENTION. — Where, under a contract for the manufacture and delivery of bricks by the plaintiff, and payment therefor in instalments by the defendant, such part of the bricks as had been manufactured having been delivered and partly paid for, the defendant refused to accept further deliveries, and plaintiff did not offer to complete performance upon his part. *Held*, that the plaintiff was entitled to recover only the amount of the unpaid instalments with interest, and not the profits which would have accrued to him had the contract been completed. *Bethel v. Salem Imp. Co.*, 25 S. E. Rep. 304 (Va.).

The facts of this case are somewhat similar to those in *Cort v. Ambergate Ry. Co.*, 17 Q. B. 127; but here the court lays down more clearly the measure of damages where there has been no offer of completion of performance by the plaintiff. One of the grounds relied upon by the plaintiff was, that, by the failure of defendant to pay for the bricks already delivered, plaintiff was unable to go on manufacturing. But the court distinctly held that the mere failure to pay money in pursuance of a contract could not be considered a prevention of performance by the defendant. *Burr v. Williams*, 20 Ark. 185. The case is clearly right.

CONTRACTS — RIGHT OF A THIRD PARTY TO SUE ON A CONTRACT FOR HIS BENEFIT. — *Held* (Ingraham, J., dissenting), that a promise made to the husband, in consideration of services rendered by him, to pay a sum of money to the wife, cannot be sued upon by the latter. *Buchanan v. Tilden*, 39 N. Y. Supp. 228. See NOTES.

CORPORATIONS — STOCK — LIFE TENANT — STOCK DIVIDENDS. — A testator bequeathed stock in a corporation to plaintiff for life, remainder to another. Stock dividends were declared from net earnings accrued since the testator's death. *Held*, a life tenant is entitled, as income, to stock dividends declared from net earnings accrued during his life tenancy. *Pritchett v. Nashville Trust Co.*, 36 S. W. Rep. 1064 (Tenn.).

The principal case adopts the Pennsylvania doctrine which, originating in *Earp's Appeal*, 28 Pa. St. 368, now prevails in the great majority of American jurisdictions.

The Massachusetts doctrine that stock dividends never go to the life tenant as income has been adopted in the United States Supreme Court. *Gibbons v. Mahon*, 136 U. S. 549. The English decisions on the right to stock dividends as between life tenant and remainderman are in a very unsatisfactory condition. The Pennsylvania doctrine is approved in the more recent text-books. 1 Morawetz, *Private Corporations*, § 468; 1 Cook, *Stock and Stockholders*, § 554.

EQUITY — BIGAMOUS MARRIAGE — FRAUD OF PLAINTIFF. — Complainant, concealing the fact that he was already married, induced defendant to marry him. He afterwards filed his bill in equity, asking that his marriage with defendant be declared a nullity. *Held*, complainant's fraudulent conduct in procuring the bigamous marriage precluded him from relief in equity. *Rooney v. Rooney*, 342 Atl. Rep. 682 (N. J.).

The Court of Chancery in England did not take jurisdiction of a bill to have a marriage declared a nullity; such a suit fell within the jurisdiction of the Ecclesiastical Court. 2 Kent's Com., 14th ed., *76. In the Ecclesiastical Court a decree of nullity was pronounced at the instance of a plaintiff in the same situation as the complainant in the principal case. *Miles v. Chilton*, 1 Rob. Ecc. 684. This precedent was followed in a case in the Probate and Divorce Division of the English court. *Andrews v. Ross*, 14 P. D. 15.

In the absence of Ecclesiastical Courts in this country, equity has taken jurisdiction of suits to have a marriage declared a nullity. *Wightman v. Wightman*, 4 Johns. Ch. 343, at p. 346. But to take jurisdiction of a bill to declare a bigamous marriage a nullity, when the complainant had knowingly procured the marriage, would do violence to one of the fundamental principles of equity. Bishop, Mar., Div. and Sep., § 722, states the law as *contra* to the decision in the principal case, but the American authorities cited by him do not sustain his statement. In accord with the principal case, *Teft v. Teft*, 35 Ind. 44.

MORTGAGES — LIABILITY OF GRANTEE OF MORTGAGED PREMISES. — *Held* (Dunbar, J., dissenting), that a mortgagee may enforce the liability of a grantee of the mortgaged premises on his assumption of the mortgage debt. *Solicitors' Loan and Trust Co. v. Robins*, 45 Pac. Rep. 39 (Wash.). See NOTES.

PARTNERSHIP — STATUTE OF USES — TRUST DEED TO USE OF FIRM. — A statute provided that a conveyance in trust to the use of "any other person or persons or of any body politic" should vest the title in fee in the *cestui que use*. *Held*, that a deed conveying land in trust for the use of a firm, the firm being designated by the firm name, vested no legal title under the statute in the partnership firm or any of its members. *Silverman v. Kristsufek*, 44 N. E. Rep. 430 (Ill.).

A partnership as such cannot hold the legal title to land (Parsons on Partnership, 4th ed., § 265, note 1); but there seem to be three views as to what effect a deed of land to a partnership has in conveying a legal title to the members of the firm. One view is, as shown by the principal case, that no one takes any legal estate. *Percifull v. Platt*, 36 Ark. 456. Another is in effect that any partner or partners whose names appeared in the firm name hold the land in trust for themselves and the other partners. *Moreau v. Saffarans*, 3 Sneed, 599; *Winter v. Stock*, 29 Cal. 407. The last view is that all the partners take the land as joint tenants or tenants in common. *Maughan v. Sharpe*, 34 L. J. C. P. 19; *Sherry v. Gilman*, 55 Wis. 324; *Powers v. Robinson*, 90 Ala. 225. The last view seems preferable in theory. All the partners must join in suit upon a covenant in a deed to a partnership (*Moller v. Lambert*, 2 Camp. 548; *Gates v. Graham*, 12 Wend. 53; *Brown v. Bastian*, 6 Jones (N. C.), 1); and if this is so it would seem that all the parties ought to be grantees as they are covenantees. The only objection to such a view is that it might lead to confusion in the examination of titles.

PERSONS — MARRIED WOMEN — ACTION FOR SEDUCTION. — The plaintiff was seduced by the defendant, subsequently married him, and afterward obtained a divorce on the ground that the marriage was obtained through fraud. She then brought suit against the defendant under a statute allowing "an unmarried female to prosecute as plaintiff an action for her own seduction." Another statute provided, in substance, that a married woman may bring an action as if sole for injuries to her person or character. *Held*, that unless the divorce amounted to a decree annulling the marriage, the plaintiff could not recover. *Henneger v. Lomas*, 44 N. E. Rep. 462 (Ind.).

The court put their decision on the ground that the statute permitting married women to sue as if sole, did not do away with the common law rule that any action a single woman may have had against her husband before marriage is lost by such marriage, and does not revive after divorce. This seems correct, and the cases cited sustain the decision. A narrower ground would have been to say that the legislature could not have intended the action for seduction to survive marriage with the seducer,

and consequently the right of action is lost unless the marriage is subsequently declared void *ab initio*.

PROPERTY — CHURCHES. — *Held*, that the majority of a church cannot change its doctrines, and still retain the property given to it, against the minority adhering to the faith in which the church was founded. *Smith v. Pedigo*, 44 N. E. Rep. 363 (Ind.). See NOTES.

PROPERTY — CONDITION SUBSEQUENT — SUB-LEASE OF ENTIRE TERM — ASSIGNABILITY OF RIGHT OF RE-ENTRY. — A., owner in fee, makes a lease to B., with conditions and a right of re-entry. B., makes a sub-lease to C. for the entire term, with the same conditions, and subsequently B. conveys to D. all his right and title in the premises. D. claims a right to enter on C. for breach of conditions. *Held*, B. having conveyed his entire estate, his right of entry is destroyed, and even if it existed he could not grant it to D., as it is not assignable. *Ohio Iron Co. v. Auburn Iron Co.*, 67 N. W. Rep. 221 (Minn.).

The court argue, from the fact that the sub-lease of a lessee's entire interest effects an assignment, that the sub-lessor can retain no right of entry. Such a view is reasonable, and accords with the tendency of the courts to alleviate the harsh results of the enforcement of conditions, but the point is held otherwise in England. *Doe v. Bateman*, 2 B. & Ald. 168. The question, however, is not necessary to the decision of the case, and the other point as to the assignability of such right of entry, assuming it to exist, is decided in accordance with the weight of authority. *Underhill v. Railroad*, 20 Barb. 455; *Rice v. Railroad*, 12 Allen, 141.

PROPERTY — DEDICATION OF PARK — ACCEPTANCE. — *Held*, that recording a plat of an addition to a city, on which a part of the land is designated as a "park," and the sale of lots with reference thereto, constitute an irrevocable dedication of the land so marked as a park, without the necessity of an acceptance by the public. *Rhodes v. Town of Brightwood*, 43 N. E. Rep. 942 (Ind.).

Aside from the fact that the land in question was not taxed for several years after the recording of the plat, there is no evidence in the case of an acceptance by the public prior to the time when the donor endeavored to revoke the dedication. It may well be questioned whether the fact that the park was not placed upon the tax list did not amount to an acceptance. As the court itself says: "This is rather an indication that all parties concerned understood that the land was dedicated to the public for a park, as shown on the plat."

However that may be, it would seem that the position taken by the court in this case is not warranted by the weight of authority. That position appears to be that acceptance by the public, either through formal action by the proper authorities or by common user, is unnecessary to the completion of the dedication of the land, where the rights of private individuals, such as purchasers of lots abutting on the supposed park, intervene. In conformity with this view, it has been held in New Jersey that no acceptance is necessary to vest the right in the public at once. *Methodist Church v. Hoboken*, 33 N. J. L. 13. But it is believed that, according to most authorities, there must be some act on the part of the public to indicate its willingness to accept the offered gift. See *Abbott v. Cottage City*, 10 East, Rep. 61; see also 5 Am. and Eng. Ency. of Law, p. 413, n. 1, and p. 415, n. 2, for further authorities. Although the question as to whether the public had a right to refuse to take the park was not discussed by the court in the principal case, yet this is certainly an important consideration. Surely, on principle the public should not be compelled to accept the legal responsibilities incident to the ownership of a park against its will. Whether the purchaser of lots abutting on a piece of land alleged by the vendor to be a public park has not a right of action against such vendor in case the said land has not been accepted as a park by the public, is, of course, a secondary question, not raised by the decision in *Rhodes v. Town of Brightwood*.

PROPERTY — FINDING CHATTELS ON PRIVATE PROPERTY. — The defendant, while cleaning out, under the plaintiffs' orders, a pool of water on their land, found two rings. The real owner was not discovered. In an action of detinue, *held*, that the plaintiff was entitled to the rings. *South Staffordshire Water Co. v. Sharman*, [1896] 2 Q. B. 44.

There is very little authority on the point decided in this case. The case most in point, *Hamaker v. Blanchard*, 90 Pa. 377, is directly *contra*. The question is one of a conflict of rights. Ordinarily a finder has the right of possession subject only to the claim of the true owner. But, on the other hand, the landowner has primarily the right to the chattel on his land by virtue of his general power to exclude others. Where, then, the finder is a trespasser or servant of the landowner, he has the position of finder in the one case through a violation of the law, and in the other case through the disregard of the right of his employer. The right of the landowner therefore sur-

vives and gives him the superior right to the chattel. This case may be said to represent the better law, and is well distinguished by the court from *Bridges v. Hawkesworth*, 21 L. J. Q. B. 75.

PROPERTY — FIXTURES — MORTGAGES. — *Held*, that a furnace, so placed in the cellar of a house that it can be removed without substantial injury to the building, does not pass under a prior mortgage of the house, in case it was placed therein under a contract providing that it should remain the property of the seller until paid for. *Duffus v. Howard Furnace Co.*, 40 N. Y. Supp. 925. See also *Willis v. Munger Manufacturing Co.*, 36 S. W. Rep. 1010 (Tex.).

The principal case raises an exceedingly interesting legal question. At least three judicial views have been advanced as to whether a chattel, when attached to the realty, is to become, under all circumstances, a fixture, and thus part of the real estate, or whether the chattel may not retain its character of personality, if it is the subject of a chattel mortgage or of an agreement between the vendor of the chattel and the owner of the realty. In New York it is held that a chattel mortgage holds even against a subsequent mortgagee, or purchaser, of the realty. See *Ford v. Cobb*, 20 N. Y. 344. In that jurisdiction, also, an agreement between the mortgagor of the realty and the vendor of the chattels that the chattels shall remain the property of the vendor until paid for, has the same effect as a chattel mortgage in preserving to the chattels the character of personality, when otherwise they would have become fixtures and passed with the mortgage of the realty. See *Tift v. Horton*, 53 N. Y. 377. The second view obtains in Massachusetts, where a mortgagee of the realty holds even against a subsequent chattel mortgagee. See *Clary v. Owen*, 15 Gray, 522. The third view is held in Vermont, where a mortgagee of realty holds the chattels annexed to the real estate prior to the execution of the mortgage, even though the mortgagor and the vendor of the chattels had agreed that they should continue as personality, but where he does not hold chattels annexed after the execution of the mortgage. See *Davenport v. Shants*, 43 Vt. 546. It will be observed that the principal case follows the New York doctrine of *Ford v. Cobb*, but is, nevertheless, strictly in accord with the position taken by the court in *Davenport v. Shants*.

Either the New York or the Massachusetts doctrine seems too extreme to be finally adopted as the true rule of law on the point under discussion. The Vermont view, however, appears to be entirely equitable. An innocent purchaser or mortgagee of realty without notice certainly advances his money in the belief that the fixtures are part of the real estate, and the chattel mortgagee or conditional vendor must be understood as having agreed that the chattels should be thus affixed to the realty. On the other hand, when a chattel is annexed after the execution of the mortgage of the realty, the mortgagee is not misled into thinking that the fixture is part of his purchase, and no injustice results, if it is not included in the mortgage.

PROPERTY — LANDLORD AND TENANT — DEFAULT OF LESSEE AVAILABLE ONLY TO LESSOR. — *Held*, a provision avoiding a lease on failure of the lessee to fulfil the covenants is available only at the option of the lessor. *Edmonds v. Mounsey*, 44 N. E. Rep. 196 (Ind.).

The courts formerly drew a distinction between leases that were to be void upon a breach of conditions, and such as were voidable only. If a lessee for life was guilty of any breach, the lease was merely voidable, even though, by its terms, it was to become thereby entirely void; and the landlord might waive his right of re-entry by some act, such as the acceptance of rent, after the breach. In the case of a lease for years, on the other hand, the breach of a condition made the lease wholly and absolutely void. Taylor, *Landlord and Tenant*, § 492. The tendency of modern decisions has been, however, both in England and in the United States, to obliterate this distinction; and it now seems pretty well settled that the effect of a provision that failure on the part of the lessee to comply with certain requirements shall render the lease null and void, makes it void only at the option of the lessor. *Liggett v. Shira*, 28 Atl. Rep. 218. *Cochran v. Pew*, 28 Atl. Rep. 219. *Creveling v. West End Iron Co.*, 16 Atl. Rep. 184. The principal case is in line with this tendency of the law, and seems to be perfectly sound.

PROPERTY — INTERFERENCE WITH SUBTERRANEAN STREAM. — *Held*, that the owner of land, through which flows a well defined subterranean stream, has no greater rights with respect to the stream than he would have if it flowed upon the surface. *Tampa Waterworks Co. v. Cline*, 20 So. Rep. 780 (Fla.).

The English law seems to be still unsettled with respect to the point decided. See *Acton v. Blundell*, 12 M. & W. 324; *Chasemore v. Richards*, 7 H. L. C. 349. In this country, however, there are now a number of decisions favoring the view here taken. See *Whetstone v. Bowser*, 29 Pa. St. 59; *Haldeman v. Bruckhart*, 45 Pa. St. 514; *Bur-*

roughs v. Satterlee, 67 Ia. 396; *Strait v. Brown*, 16 Nev. 317; *Hale v. McLea*, 53 Cal. 578. It seems much more satisfactory to distinguish, as here done, between waters in well defined courses and waters percolating or draining, than to apply different rules to waters on the surface and those under ground, as indicated in *Action v. Blundell*, *supra*.

PROPERTY — RIGHT OF LESSEE TO INSURANCE — LEASE WITH OPTION TO PURCHASE. — A lease of a portion of a business block required the lessee to pay taxes and insurance on, and keep in repair, the entire premises, and gave him the option of purchasing the premises during or at the expiration of the lease, for a certain price, on which rent paid prior to the exercise of the option was to be credited. No provision was made in the lease for the application of proceeds of insurance in case of loss. The lessee insured in the lessor's name to an amount agreed upon by them, and, a loss occurring, the lessor received the insurance money, and expended part of it in restoring the premises. On subsequently exercising his option of purchase, *held* that the lessee was entitled to have the balance of the insurance money in the lessor's hands credited as a payment on the price. *Williams v. Cilley*, 34 Atl. Rep. 765 (Conn.).

There appears to be a singular absence of authority in point. The court expressly states that the decision is largely based on the peculiar facts of the case, and should be confined to them rather than laying down a broad rule applicable in general to contracts of option. Much importance is attached to the fact that the plaintiff's relation to the premises in question, as lessee of a *portion* thereof, was designed, intended, and understood by the parties to be "subordinate and incidental to the broader connection with the entire property as an inchoate or initiate purchaser"; and that the insurance on all the property was paid by the lessee to protect both parties. If this construction can be put upon the facts, the decision seems eminently sound, since the insurance money, though paid to the defendants as owners of the legal title to the property, would then become what the property itself was, a thing to which an equity attached.

PROPERTY — RIGHT TO SUPPORT OF LAND. — *Held* (Holmes, Knowlton, and Lathrop, JJ., dissenting), that a city digging a ditch in the highway is liable for damages to abutting land, resulting from the withdrawal of quicksand from under its surface, which is taken out with the percolating water by pumps. *Cabot v. Kingman*, 44 N. E. Rep. (Mass.) 344. See NOTES.

PROPERTY — RIGHTS OF TOMB OWNER. — Surviving relatives placed the remains of their dead in a certain tomb, relying on the assurance of the tomb owner that the remains should rest there undisturbed forever. *Held*, that such tomb owner could be enjoined from removing the remains to another place of burial. *Choppin v. Labranche*, 20 So. Rep. 681 (La.).

The court admit that no easement or right of property in the tomb was acquired by the gratuitous promise of the tomb owner, but they enforce his promise on the ground that the sanctity of the grave must be maintained. Notwithstanding this principle of public policy, it is hard to understand how a court of equity can enforce a mere revocable license. *Partridge v. First Independent Church*, 39 Md. 631, and *Craig v. First Presbyterian Church*, 88 Pa. St. 42, are opposed to the doctrine of the principal case.

SALES — WARRANTY. — Where an inferior article was shipped on an order, and was accepted, but breach of warranty set up in defence to an action, *held*, that there is an implied warranty that the goods are what were ordered and that the retention of them is not incompatible with a reliance upon the warranty, but is merely evidence of waiver of the right to sue. *Northwestern Cordage Co. v. Rice*, 67 N. W. Rep. 298 (N. Dak.).

There was probably an implied warranty (*Randall v. Newsum*, 2 Q. B. D. 102); and it is believed that the case is right in holding waiver of the right to sue merely a matter of intention based on the evidence. But the law is unsettled. If the warranty is express, the goods may be retained without prejudice to a right of action on the warranty (*Studer v. Bleisern*, 115 N. Y. 316, 325); and while it is sometimes held that there is no difference between an express and an implied warranty (*Bryant v. Iburg*, 13 Gray, 607), the weight of decisions seems to be that where the goods are retained a breach of an implied warranty is waived. *Fairbank Canning Co. v. Metzger*, 118 N. Y. 260.

TORTS — LIBEL INVITED BY THE PLAINTIFF. — The plaintiff, learning that the defendant had in his possession a letter containing a libel on him, sent to him agents who by means of false representations, induced the defendant to read the letter to them. *Held*, that unless there had been a previous unprivileged publication the plaintiff could not recover. *Müller v. Donovan*, 39 N. Y. Supp. 820. See NOTES.

TORTS — NEGLIGENCE — LIABILITY OF MAKER. — Defendant, a contractor, remodelled a building so negligently that two years after it had been turned over to the

owner it fell and killed plaintiff's daughter who was passing. *Held*, that the contractor was not liable for injuries to the passers by. *Dougherty v. Herzog*, 44 N. E. Rep. 457 (Ind.).

Plaintiff was the guest of a member of a social club which had hired a coach of defendant for an excursion. Through defendant's negligence the coach broke down, injuring plaintiff. *Held*, that defendant was liable to guests of the club, since it must have been the understanding that guests were to use the coach, and in so doing they were merely carrying out a right which the club members had under the contract. *Glenn v. Winters*, 40 N. Y. Supp. 659.

In cases of this sort, most courts follow *Winterbottom v. Wright*, 10 M. & W. 109, and refuse to allow recovery by any one not a party to the contract. For instance, in *Curtin v. Somerset*, 140 Pa. St. 70, the builder of a hotel was held not liable for injuries caused by his negligence to a guest. Where, however, the article is dangerous to human life, the right of recovery is extended to any user of it, as in case of medicine with a wrong label. *Thomas v. Winchester*, 6 N. Y. 397. Though this exception is well settled by authority, it seems illogical. Outside this narrow class of cases it is very difficult to make any extension on principle which does not work injustice in practice and encourage frivolous suits. The extension suggested in *Glenn v. Winters*, as stated above, seems a good one if strictly interpreted, though it cannot be reconciled with *Curtin v. Somerset*, *supra*. But no court has yet gone so far as to allow recovery in a case like *Dougherty v. Herzog* (*supra*), where the plaintiff's daughter was in no way connected with the contracting parties.

TORTS—RECAPTION OF GOODS.—Defendant entered plaintiff's house without plaintiff's consent by force of a warrant to search for goods of his which had been wrongfully taken there by plaintiff; and while there he took also other goods which he had bailed to plaintiff. *Held*, that a license to enter to take the bailed goods was to be implied from the fact that the plaintiff had allowed them to be put there. *Madden v. Brown*, 40 N. Y. Supp. 714.

As the bailed goods were not covered by the warrant, the plaintiff in taking them became a trespasser *ab initio*, unless he could justify entry to take them without the warrant. Although it is doubtful how far a court would go to-day in sustaining the doctrine of trespass *ab initio*, the view taken by the court made the decision of that question unnecessary. There is no question as to the right to enter even a man's house to retake goods wrongfully taken there by him. But as to goods not wrongfully taken the correctness of the case is not so certain. In the cases of that sort where entry has been allowed, the ground is taken that a license to enter is to be implied from the relations of the parties. As, for instance, where goods are sold to be delivered on the premises. And the Massachusetts courts are inclined to restrict this doctrine very closely. *McLeod v. Jones*, 105 Mass. 405. There is a *dictum* of Littleton, J., often cited, in which he denies the right to enter a man's house to retake bailed goods. Note to *Webb v. Beavan*, 6 M. & G. 1055. The New York court seems to have gone very far in implying a license to enter from the mere fact of a bailment which had terminated.

TRUSTS—CONSTRUCTIVE.—A wife, receiving funds of her own, paid them over to her husband, without more. He invested them in land, telling her that he had invested the funds for her, but taking the title in himself. On his death it was sought to have the land declared a resulting trust. *Held*, that for a trust there must have been a contract or special promise by the husband to invest the funds for her, and his statements to her were not sufficient. *Nashville Trust Co. v. Lansom's Heirs*, 36 S. W. Rep. 977 (Tenn.).

Where the money is furnished by one person and the title taken in the name of another, it is generally declared a constructive trust. *Lloyd v. Spillett*, 2 Atk. 150. It is presumed that the stranger was not intended to enjoy the beneficial interest. Yet it may be shown by extrinsic evidence that the full benefit was bestowed. *Rider v. Kidder*, 10 Ves. 360. And so where the purchaser takes the title in the name of some member of his family, the fact of the relation is supposed to rebut the resulting trust, and establish a presumption that the holder of the title was intended to take the entire interest. 1 Perry on Trusts, 4th ed., § 143. But this presumption is based upon the "moral, natural, or legal obligation to provide" for the nominal purchaser; and no such obligation here seems to rest upon the wife. Yet, waiving that objection, it is generally held that evidence may repel the presumption arising from the family relation; *Butler v. Ins. Co.*, 14 Ala. 777; and the question is regarded as one of intention. *Dyer v. Dyer*, 2 Cox, 94. So that the propriety of this decision, that there must be a clear contract or promise by the husband, is at least doubtful. *Moulton v. Haley*, 57 N. H. 184.

TRUSTS—RESULTING—STATUTE OF FRAUDS.—In a deed conveying land which is absolute in its terms and contains the usual declaration of uses in favor of the

grantee, absence of consideration, if shown merely by parol evidence, is not sufficient under the Statute of Frauds to raise a resulting trust in favor of the grantor, where there has been no fraud in procuring the deed. *Lovett v. Taylor*, 34 Atl. Rep. 896 (N. J.).

The decision follows the great weight of authority in this country. 1 Perry on Trusts, 4th ed., § 162, and also the earlier cases in England; *Lloyd v. Spillet*, 2 Atk. 148; but the more recent English cases are almost directly in opposition. *Davies v. Otty*, 35 Beav. 208; *Childers v. Childers*, 1 DeG. & J. 482; *Haigh v. Kaye*, 7 Ch. App. 469. The ground on which these decisions rest is that, although the Statute of Frauds makes of no value parol evidence of lack of consideration for the purpose of raising a resulting trust in such a case, yet the mere subsequent holding by the grantee after demand is a fraud of such a nature as to take the case out of the statute. The answer given to this line of reasoning in *Randall v. Randall*, 9 Wis. 379, is that the fraud alleged does not occur in procuring the deed, and therefore is not one that the statute takes cognizance of in limiting its own application.

TRUSTS — SEPARATE USE — RESTRAINT AGAINST ANTICIPATION. — By the Married Women's Act of 1882, all the separate property of a married woman — after acquired as well as that owned at the time the engagement was entered into — was made liable for her obligations. Sec. I. sub-sec. 19, however, provided that nothing in the act should "interfere with or render inoperative any restriction against anticipation." The appellant's assignor obtained a judgment against respondent, a married woman. At the time the judgment was rendered there was due to respondent accrued income from property settled to her separate use without power of anticipation. *Held*, reversing *Loftus v. Herriot*, [1875] 2 Q. B. 212, that the restraint on anticipation is gone the moment the income becomes due and payable; that appellant therefore was entitled to have his judgment paid out of income due before the date of the judgment. *Hood Barrs v. Herriot*, [1896] A. C. 174 (House of Lords).

While the decision in the principal case is carefully limited to the case of income accrued before judgment, the *ratio decidendi* deals a death blow to the authority of those cases in which it has been held that income accrued after judgment on property subject to a restraint is not subject to seizure. *Hood Barrs v. Cathcart*, [1894] 2 Q. B. 559. This decision, recognizing much broader rights in a creditor as against a married woman's estate than he has hitherto been supposed to possess, is of great practical importance in England.

The decision in the principal case has a suggestive bearing in connection with the doctrine of spendthrift trusts. Granting the validity of such trusts, has not the beneficiary complete power of disposition over accrued income of the trust which the trustee is bound to pay him? If he has full power of disposition over such accrued income, is it not liable to seizure by his creditors? On the facts of *Steib v. Whitehead*, 111 Ill. 247, and *Smith v. Towers*, 69 Md. 77, apparently such accrued income is not liable to seizure. In neither of these cases, however, was the point here suggested argued; in both cases the opinion deals solely with the question of the validity of a spendthrift trust.

WILLS — CONSTRUCTION. — Testator, having a lawful wife, whom he had deserted, married again and lived with the second wife until he died. By his will he bequeathed certain property to his "wife." *Held*, that, on the evidence, the second wife was intended and should take. *Pastene v. Bonini*, 44 N. E. Rep. 246 (Mass.).

The decision shows the court's opinion to be that it is competent to show, by evidence, that an inaccurately described legatee is intended, though the description may accurately apply to another. The case resembles, in this respect, *Grant v. Grant*, L. R. 5 C. P. 727. It is probable that in *Tucker v. Seaman's Aid Society*, 7 Metc. 188, the evidence was not sufficiently strong in favor of the party inaccurately described, and that that case is really not *contra* to the present decision. The principal case is interesting, also, as showing the refusal of the court to recognize any rule of law which declares that wife shall mean "lawful wife," or any presumption to that effect. *Hardy v. Smith*, 136 Mass. 328, followed. The analogous presumption raised by the law, namely, that "children" means legitimate children (*Doe d. Thomas v. Beynon*, 2 A. & E. 431) was not overlooked by the court, but rather disregarded.

REVIEWS.

A FIRST BOOK OF JURISPRUDENCE. By Sir Frederick Pollock, Bart.
New York : The Macmillan Co. 1896. pp. xvi, 348.

"To readers who have laid the foundation of a liberal education and are beginning the special study of law," this latest work of Sir Frederick Pollock is addressed. That those whose law studies began many years ago will derive fully as much benefit from it as beginners is certain. It is one of those books that open up to a lawyer a broader view of the dignity of his profession. Written by the keenest of legal thinkers, and enlivened by illustrations drawn from history and literature, it makes delightful reading from beginning to end. Sir Frederick's well known literary style is unsurpassed for work of this sort. In fully as marked a degree as the kindred treatises of Sir Henry Maine and Professors Holland and Markby, the *First Book of Jurisprudence* is no less an addition to English literature than to the science of the law.

The first part of the book deals with general legal notions, including the nature, meaning, subject matter, and divisions of law, and the legal significance of such general terms as Thing, Event, and Act. "We find in all human sciences that those ideas which seem to be the most simple are really the most difficult to grasp with certainty and express with accuracy." So speaks the author and contrasts the ease with which the student defines a fee simple, for example, with the difficulties that beset the greatest jurist "in face of the apparently simple question, What is Law?" To the solution of these apparently simple, but far-reaching and fundamental problems Sir Frederick devotes the larger portion of the book. Part II., on Legal Authorities and their Use, entirely different in character, as its name indicates, is not a whit less interesting. Especially valuable are the analysis of sovereignty as distinguished from ultimate political power, and the discussion of the authority of precedents in the various courts of England and America.

To readers of the *HARVARD LAW REVIEW*, certain parts of the book will be familiar. The chapters on Justice according to Law, Divisions of Law, and Sovereignty in English Law, have already appeared as articles in these pages.

R. G. D.

A TREATISE ON THE LAW OF REAL PROPERTY, as applied between Vendor and Purchaser in Modern Conveyancing, or Estates in Fee and their Transfer by Deed. By Leonard A. Jones. Boston and New York : Houghton, Mifflin & Co. 1896. 2 vols., 8vo, pp. clxxiv, 783, viii, 853.

For a single author, in a single treatise, even of sixteen hundred pages, to treat thoroughly the whole law of Real Property would be too heavy a task. Mr. Jones has not attempted so much as that; though what he has undertaken is no small matter. To quote his own words: "These volumes do not profess to cover the entire field of Real Property law. It is impossible in two or even three volumes to state the law and give the authorities relating to the entire subject. It is only possible in such compass to state general principles with a meagre citation of authorities. I write now, as I have written heretofore, with the purpose to state with considerable fulness the law of the topics of which I treat,

— to state it with such completeness as to make the treatise valuable to the courts and to practising lawyers. Moreover, I have intended to state the law only as it now is, with as little reference as possible to the law that has become obsolete. . . . The subjects that present the most difficulties and give rise to the most litigations I have discussed with the greatest care. I have cited a great number of cases, and have cited them after examination for their value." As might have been expected from his well known books upon Mortgages, Mr. Jones has done his work with admirable care and thoroughness. This book can hardly fail to be of great use to practising lawyers, — all the greater, perhaps, because it passes over many parts of the general subject interesting to students.

R. G.

NEW CRIMINAL PROCEDURE. By Joel Prentiss Bishop, LL. D. Fourth Edition, Vol. II., Specific Offences and their Incidents. Chicago: T. H. Flood & Co. 1896. 8vo, pp. xii, 882.

The first volume of this "new and revised" edition of the *New Criminal Procedure* appeared last year. (See 9 *HARVARD LAW REVIEW*, 161.) Of a second volume in a new edition of one of Mr. Bishop's works little need be said. According to the general system followed by the author in his writings, the work is really rewritten to attain greater clearness and at the same time greater conciseness. In spite of the added citations, if the index is not counted, the volume is slightly smaller than the third edition.

Though it is said in the Preface to the first volume that it is complete in itself, the second volume is a valuable adjunct. Treating as it does of "the specific offences," it brings out those peculiarities and essentials of each crime which are of importance in the indictment, in the evidence, and in practice. Here is found, for instance, the rule that in perjury "oath against oath" is insufficient, — its original and its modern significance. Setting forth in convenient form all the minor elements and peculiarities of each crime, the book should often prevent a slip or surprise in practice.

E. S.

ELEMENTS OF THE LAW OF TORTS. By Melville M. Bigelow, Ph. D., LL. D. Sixth Edition. Boston: Little, Brown & Co. 1896. pp. 386.

This latest edition of a work widely and favorably known, is new only in the "General Doctrine" or general theory of the law of torts, which now appears as an introduction. Regarding the body of the book it needs only to be said that the author has followed the same systematic arrangement of "Specific Torts" according to the elements of liability, previously adopted by him, and that the whole is thoughtfully and well done. The merits of the added preliminary discussion are worthy of special notice. The distinction there pointed out between Right and Privilege, the elaborately explained definition of Tort, and the consideration of Persons, are clear and satisfactory. The best portions of the "General Doctrine," however, are those sections dealing with "Legal Cause" and "Termination of Liability." These two topics, generally inadequately treated, are here so simply and definitely handled as to command the reader's admiration, and to prepare his understanding for what follows.

R. L. R.

MARKETABLE TITLE TO REAL ESTATE. Being also a Treatise on the Rights and Remedies of Vendors and Purchasers of Defective Titles, including the Law of Covenants for Title, the Doctrine of Specific Performance, and other Kindred Subjects. By Chapman W. Maupin, of the Washington, D. C., Bar. New York: Baker, Voorhis & Co. 1896. 8vo, pp. lxvii, 850.

This is a book with a novel title, largely made up of matter usually found under the heading of Vendor and Purchaser. The special merit claimed for the work is that it treats completely of "the law of title to real property, as that law is applied between vendor and purchaser," containing matter heretofore found scattered under the different heads of Covenants for Title, Specific Performance, Equity Jurisprudence, Deeds, Titles to Real Estate, Real Property, Abstracts of Title, Judicial Sales, Subrogation, etc. The value of such a book, intended solely for reference purposes, depends chiefly on its being constructed on a good system, thoroughly carried out. Mr. Maupin is systematic in detail as well as in general plan, from the analysis preceding the table of contents to the ample index at the end of the volume. The book is written carefully and clearly, and ought to save the profession considerable work in cases concerning defective titles.

R. G.

HANDBOOK ON THE LAW OF REAL PROPERTY. By Earl P. Hopkins, A. B., LL. M. St. Paul: West Publishing Co. 1896. (Hornbook Series.) pp. xiv, 652.

The author has certainly undertaken a great deal in the attempt to deal with the law of real property so briefly. He says: "This volume is the result of an attempt to put the fundamental rules governing the law of real property into a form as easy of comprehension as possible, and so arranged that investigation of any part may be made with ease, promptness, and certainty." His clear style certainly makes the propositions of law laid down easy of comprehension. The necessary limitations of the work are illustrated, however, in the one paragraph devoted to equitable conversion. The text merely serves as a guide to the cases cited in the notes and for further information the reader is referred to several works on equity. The value of this "Hornbook" would seem to lie in the fact that here the busy practitioner may quickly verify his own idea of the law on a matter of ordinary occurrence, or may find his way to the authorities. It seems strange, therefore, that the author should have set himself the additional task of explaining by the historical method what appear to be mere technicalities in the modern law.

E. S.

KENT'S COMMENTARIES ON AMERICAN LAW. Fourteenth Edition. Edited by John M. Gould, Ph. D. Boston: Little, Brown & Co. 1896.

This new edition of Kent's Commentaries embodies in full the notes of Mr. Justice Holmes to the twelfth edition, and many of those supplied by Mr. Barnes to the thirteenth. Each set is carefully distinguished from the others. The editor has been most painstaking in bringing the work up to date. To the twenty-four thousand cases cited in the last edition he has added nearly nine thousand. Notwithstanding this, the convenient size of the volumes is not appreciably increased.

R. G. D.

A MANUAL OF ELEMENTARY LAW. By Walter Denton Smith. St. Paul : West Publishing Co. 1896. (Hornbook Series.) pp. xviii, 367.

The subject of elementary law has been written up so many times and so exhaustively that one who deals with it in these days may be pardoned if the result of his labor is not marked by striking originality. Mr. Smith has covered within a very short space most of the topics dealt with in Kent's Commentaries. The book is surprisingly readable, and its only shortcomings of note may be ascribed without hesitation to the difficulties inherent in treating so large a subject so briefly. If it does not meet with so much success as other volumes in the Hornbook Series it will be because the market for ten-page discussions of the entire law of Torts and twenty-line elucidations of the mysteries of quasi-contract is already overstocked.

R. G. D.

EXTRAORDINARY CASES. By Henry Lauren Clinton. New York : Harper and Brothers. 1896. pp. ix, 403.

"Extraordinary Cases" is a book intended for both the general and the professional reader. The author's idea is to describe the cases of peculiar interest with which he has been connected in forty years of practice, to give sketches of eminent men with whom he has been thrown, and to recount anecdotes of a long experience at the bar. The idea is excellent, but it must be said that the most has not been made of the opportunity. For the general reader there is too much that is technical, and for the lawyer as well, in a book of this nature. Some of the author's long addresses to the jury, especially where little else is said of the case, are likely to weary. The space so taken up could have been better occupied, as the book itself shows. There is much in these pages, however, to repay perusal, and the reader can choose for himself. The picture of the practice of law in days gone by is exceedingly interesting, as are the glimpses of men of note.

E. S.

THE JEWISH LAW OF DIVORCE ACCORDING TO BIBLE AND TALMUD.
With some References to its Development in Post-Talmudic Times.
By David Werner Amram, of the Philadelphia Bar. Philadelphia : Edward Stern & Co. 1896. Small 8vo, pp. 224.

The subject of this little treatise would seem to concern rather the student of ecclesiastical law than the lawyer who is struggling with the difficulties of the civil regulations of our American divorce laws. The book, however, is well enough written to interest any one caring at all for the history of law ; giving, as it does, an admirable account of a tolerably definite portion of a very ancient legal system. While treating as fully as possible of the historical development of the subject, the book is not merely an historical essay, but is a thorough and well arranged exposition of a part of the Jewish law, written as a law-book should be, systematically, with full citation of authorities, and a good index. The learning displayed, though hardly to be tested by one unfamiliar with Talmudic lore, has every sign of accuracy. The quality of the print and paper is excellent, better than the unwieldy bulk of material in most of our text-books allows.

R. G.

HARVARD LAW REVIEW.

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No. 4.

TWO YEARS' EXPERIENCE OF THE NEW YORK STATE BOARD OF LAW EXAMINERS.¹

THE invitation which so kindly was extended to me to prepare this paper was accepted with much hesitation, and principally because of our Secretary's assurance that the experience of the New York State Board of Law Examiners, short though it has been, might be of use to the profession in other States.

"Justice, Sir," said Webster, "is the great interest of man on earth."

At Lincoln's Inn Hall, on October 28, 1895, at the opening of the course of lectures under the Council of Legal Education, the subject of the address included the requirements for admission to the bar both in England and the United States, and the speaker was the Lord Chief Justice of England.²

It is a high duty that rests upon the State to see to it that, in the administration of justice, none but men of learning and character shall be permitted to bear a part, and among the true leaders of the bar there has ever been that "chastity of honor which felt a stain like a wound."

¹ A paper read at Saratoga, August 21, 1896, before the Section on Legal Education of the American Bar Association.

² The Law Times, vol. 100, p. 16.

In some States of the Union the profession has had to struggle with a popular delusion that no general or professional education should be required of any one before his admission to the bar.

There is, probably, no State in which the examination for admission to the bar is more thorough to-day than it is in New Hampshire. In a letter, however, which Mr. Chief Justice Carpenter, of that State, has been kind enough to write to me upon the subject of admission to the bar, he recites the fact that from 1842 to 1872 it was provided by Statute as follows: "*Any* citizen of the age of twenty-one years, of good moral character, on application to the Supreme Court, *shall* be admitted to practise as an attorney." "The result of this system," writes the Chief Justice, "was to introduce into the bar many persons ignorant of elemental legal principles, uninstructed in professional duty, and wholly unworthy of their trust. Many such persons have been removed from office by the Court, for unprofessional conduct, due, in a majority of cases, to ignorance of their duty, rather than to a wilful misdoing."

It was not until 1878 that the Supreme Court of New Hampshire adopted the system of examinations, which has prevailed to the present time, and which, in its important features, is the same as that which, since January, 1895, has existed in New York. It is accordingly with great pleasure that I am permitted to quote Mr. Chief Justice Carpenter on the effect of the change. He writes: "The effect of the system has been highly salutary. The expectation of the Court in adopting the system has been fully realized. The professional standing of the younger members of the bar, of those admitted since 1878, as a class, is vastly higher than was that of the young men admitted before that time. As a necessary consequence," the Chief Justice continues, "the bar, as a whole, is constantly increasing in strength and influence and in the confidence of the public. The system operates to the great satisfaction of the bar, and now, I think, to that of the people generally, some of whom were, at first, disposed to condemn it, and sought to abolish it by legislative action."

The conditions that prevailed in New York before the passage of the act under which the present Board was appointed; the object which the Legislature had in view in passing the act; the work which the Board has done, and the results which thus far have been obtained, are the topics to which this paper will be devoted.

In September, 1876, in a paper read at a meeting of the American Social Science Association held at Saratoga, Mr. Lewis L. Delafield, in describing the condition of legal education and admission to the bar in New York, said: —

“Unhappily the law gave to the three principal schools the pernicious privilege of having their graduates admitted to the bar upon presentation of the school diploma, and without the public examination in open court, required by the rules. The charters of the schools varied greatly; the graduates of the Hamilton Law School might be admitted whenever they could pass an examination in the school, without reference to the time of their studies; the Albany and University schools might admit in thirty-six weeks, and the Columbia School in eighteen months, without any public examination. The difference and the privilege were alike unreasonable. This partial legislation naturally led to evasion. The Columbia College School construed the eighteen months required by the Statute as meaning academic months, and thus reduced the term to fifteen statute months. In the competition which ensued, all conditions of fitness were overlooked, no preliminary examinations were required, the school catalogues announced that no examinations and no particular course of previous study were necessary for admission. In all the schools the professors themselves conducted the examinations for admission to the bar. Thus, the singular spectacle was presented of first inviting all, however unfitted, to study law, and then admitting them to practice upon the report of their instructors.”¹

During several years after 1876, when the Court of Appeals of New York adopted rules requiring a public examination of applicants for admission to the bar, the Legislature passed acts exempting graduates of New York law schools from the necessity of taking such an examination.

For many years before 1894 the General Term of the Supreme Court in each of the five Judicial Departments had been in the habit of appointing from the bar a committee, which usually consisted of three members, to conduct examinations for admission to the bar. In some departments there were both oral and written examinations, while in at least one department there was no written examination and the oral examination did not deserve the name. In that department the efforts of the bar to raise the standard of examinations, or, rather, to create some standard, met with continued and stubborn opposition by the Presiding Justice of

¹ Penn. Monthly for 1876, vol. 7, p. 960.

the General Term. On the other hand, no complete history of the progress of the efforts to establish thorough examinations for admission to the bar will admit an acknowledgment of the debt that the community owes to the Presiding Justice of the Appellate Division of the Supreme Court in the First Judicial Department. Other judges throughout the State have given their influence to the same end, but the very fact that, of the applicants for admission to the bar, probably more than half the entire number applied in the city of New York, made the attitude of the Presiding Justice in the First Department of controlling importance.

A history of the struggle out of which has come the present system would be interesting, but my principal object is to give a statement of the system, the methods which the Board of Law Examiners has adopted, and the results that, thus far, have been obtained.

The system, which owes its existence largely to the untiring efforts of the New York State Bar Association, was made possible by an act of the Legislature (Chap. 760, Laws of 1894) which authorized the Court of Appeals to appoint a State Board of Law Examiners, to consist of three members. The term of office was fixed at three years, and the court was authorized to fix the compensation of the members, such compensation to be paid out of a fund to arise from the payment made by each applicant of the sum of fifteen dollars, entitling the applicant to three examinations if necessary. In October, 1894, the Court of Appeals appointed William P. Goodelle, of Syracuse, ex-Judge Franklin M. Danaher, of Albany, and the writer of this paper.

In order to entitle an applicant to an examination he must prove by his affidavit that he is a citizen of the United States, a resident of New York, twenty-one years of age, and that he has studied law three years, "except that if the applicant be a graduate of any college or university his period of study may be two years instead of three." — Rule IV.

The course of study must be followed after the age of eighteen years, and may consist of serving a clerkship in an office, or in attendance at "an incorporated law school, or a law school connected with an incorporated college or university, having a law department organized with competent instructors and professors, in which instruction is regularly given," or in part by attendance at such law school, and in part by serving such clerkship. — Rule V. Subdivision 1,

If the applicant be a college graduate, he must have pursued his study of law after graduation.

"Applicants who are not graduates of a college or university shall, before entering upon the clerkship or attendance at a law school, or within one year thereafter, have passed an examination, conducted under the authority and in accordance with the ordinances and rules of the University of the State of New York, in English Composition, Advanced English, first year Latin, Arithmetic, Algebra, Geometry, Civics, and Economics, or in their substantial equivalents as defined by the rules of the University." — Rule V. Subdivision 3.

By this rule the Regents of the University are permitted to accept as an equivalent either a Regent's Diploma or a certificate that the applicant has completed successfully a full year's course of study in a college or university, or that he has completed satisfactorily a three years' course of study in any institution registered by the Regents as maintaining a satisfactory academic standard. The attendance in a law school must have been for two entire school years of not less than eight months each. In computing the period of clerkship in an office a vacation actually taken, not exceeding two months, is allowed as part of the year.

The rules provide for admission to the bar in New York, on motion, of any person who has been admitted to the bar in another State and practises there in the highest court of law, or "who, being an American citizen and domiciled in a foreign country, has received such diploma or degree therein as would have entitled him, if a citizen of such foreign country, to practise law in its courts." Persons who have been admitted to the bar in another State, and remained therein as practising attorneys for at least one year, may be entitled to the examination after a period of law study of one year within this State.

The object of the Legislature was to establish a high and uniform standard for admission to the bar; and to secure that object the members of the State Board of Law Examiners have given their best thought and much labor, realizing that the success of the new system must depend largely on the manner in which it should be administered.

The task of one who examines applicants for admission to the bar may differ from that of the professor who examines his students on the work they have done. The examiner for ad-

mission to the bar deals with the results of legal education obtained under the instruction of others. His duty is to ascertain whether the applicant is qualified to advise clients. But a client needs advice as to his legal rights or obligations, in his particular case, that is, on the facts that he presents to his adviser.

The examination for admission to the bar ought, therefore, to test the ability of an applicant to apply the principles of the law to given facts. A readiness in giving definitions and repeating rules of law is quite consistent with utter incapacity to apply the doctrines of law or equity to the simplest case. An applicant, who repeated with accuracy the Latin names of the different kinds of bailment, showed, by his answer to a question based on given facts, that he could not distinguish a bailment from a sale.

From the beginning of our work as examiners, we have adopted the plan of putting questions that require the applicants to show whether or not they know what principles of law are involved in the solution of given problems, and have selected such problems as might naturally be presented to a lawyer for his solution. It is true that this plan of examination differs from that which, for many years, had existed in some of the Judicial Departments of this State, and from that which now exists in many other States; it is not, however, new.

A few weeks ago I read the following account of the method of examination which was applied by the late Charles O'Connor. "Mr. O'Connor stated certain facts and asked the one at the head of the class what legal proceedings he would take if applied to in such a case." Our plan of examination is identical with that adopted by Mr. O'Connor.

During the first year we retained the oral, in addition to the written, examination. Failure, however, to pass the written examination was followed, almost invariably, by the display of further ignorance on the oral examination. Even when that did not happen, correct answers to the few questions that the necessary limits of an oral examination permitted, did not cure the ignorance which the written answers had disclosed.

Cleverness and fluency might enable some to make a good impression, but could not be accepted as substitutes for knowledge of the law. Unless each applicant can be examined separately and apart from the others, and examined at leisure, as is done in some

of the German universities, an oral examination precludes anything like even a pretence of uniformity. But it was uniformity of standard that the Board was expected to establish. Finally, oral examinations become impracticable when between four and five hundred applicants present themselves at one examination.

I have endeavored to show briefly how we have construed our duty, and the methods that we have employed.

The results of the work which the State Board thus far has performed are plain and important. I take pleasure in giving the statistics, realizing that they are not broad enough yet to furnish a safe basis for inferences.

The State Board held its first examination in January, 1895.

The number of applications received to June, 1896, is 1118.

The number of applicants examined is 1051.

The number of applicants who were graduates of colleges or universities, 433.

The number of applicants who were not graduates of colleges or universities, 652. This number includes 28 whose records of preliminary study are incomplete, and who are included in this class because they are not *shown* to be graduates.

The number of applicants who had been admitted to the bar in other States, 33.

The graduates of colleges and universities came from sixty-nine different institutions. Taking the colleges or universities that sent more than nine applicants apiece, in the order of the number of applicants, except that Harvard and Princeton sent the same number, they are as follows: Yale, College of the City of New York, Harvard, Princeton, Columbia, Cornell, Hamilton, Amherst, University of the City of New York, and Williams.

Of the 433 graduates of colleges or universities, 65 had only office experience, 83 had both law school and office experience, while 285 had only law school experience.

Of the 652 applicants who were not graduates of a college or university, 192 had had only office experience, 349 had both law school and office experience, while 83 had only law school experience. As has been said, there is no record of 28.

Of the 1050 examined, 793 had had training in a law school, while 257 had had only experience in an office.

Of the 793 who had attended law schools, 116, or about 14 per cent, failed to pass one or more times.

Of the 257 who had not attended a law school, 68, or about 26 per cent, failed to pass one or more times.

Of the 433 who were graduates of colleges or universities, 51, or about 11 per cent, failed to pass one or more times.

Of the 65 college graduates who had had only office experience, 16, or about 24 per cent, failed to pass one or more times.

Of the 83 college graduates who had both law school and office experience, 11, or about 13 per cent, failed to pass one or more times.

Of the 285 college graduates who had only law school experience, 24, or about 8 per cent, failed to pass one or more times.

Of the 652 who were not college graduates, 133, or about 20 per cent, failed to pass one or more times.

Of the 192 who had attended neither college nor a law school, 51, or over 26 per cent, failed to pass one or more times.

Of 349 who had no college education, but who had both law school and office experience, 72, or over 20 per cent, failed to pass one or more times.

Of the 83 who had no college education, and had attended a law school but not an office, 10, or over 12 per cent, failed to pass one or more times.

The Board has examined 14 women and admitted 12.

Of the 1118 who have applied for examination, there are 85 who are entitled to another examination. The provision that entitles an applicant to three examinations, without further fee, operates favorably. The applicant who fails to pass the first time looks upon his failure not as a rejection, but only as a postponement and an incentive to do better work.

The work that the State Board has done is not primarily educational. The steady adherence to its purpose to maintain a high standard for admission to the bar has, however, strengthened the hands of instructors of the law. It is unhappily true that, ordinarily, the question that the student asks is, What is the least amount of preparation that will enable me to pass the examination for admission to the bar? Thus the requirements of the State Board become of direct assistance to the cause of legal education.

In one respect the rules of the Court of Appeals ought, I think, to be changed. The rule allows an applicant to count one year's study of law *before* he has taken his Regents' examination. The requirements of that examination are not very severe, and the applicant ought not, I think, to be allowed to count any time that

he has spent in the study of the law before he has passed the Regents' examinations.

Upon another point there can be no doubt. There should be only one set of questions presented for the entire State at a given term of court. The New York Statute requires the Board of Law Examiners to hold two examinations each year in each Judicial Department. As there are four departments, the three examiners are obliged to present one examination paper in New York and Brooklyn, and on another day a different paper in Rochester and Albany. An amendment that will permit the Board to hold the examination for both the First and Second Departments either in New York or Brooklyn is essential to uniformity of standard.

A knowledge of the legal, political, and to-day one is inclined to add the financial, history of his country, as well as of its common and statute law, should be required of every one who seeks admission to the bar.

At an address delivered at the annual meeting of the Chicago bar on July 16, 1896, Mr. Charles H. Aldrich, after describing the distress that existed in the country at the close of the Revolutionary War and the jealousy that then divided the States, called attention to the fact that at that time there came into existence and power a large and violent party who proclaimed that the prosperity of the country lay in issuing unlimited irredeemable paper money, and in proscribing the lawyers.

Mr. Aldrich's statement receives apt illustration in the following extract from the "Letters of an American Farmer," written in 1782:—

"Lawyers . . . are plants that will grow in any soil that is cultivated by the hands of others, and, when once they have taken root, they will extinguish every vegetable that grows about them. The fortunes they daily acquire in every province from the misfortunes of their fellow citizens are surprising. The most ignorant, the most bungling member of that profession, will, if placed in the most obscure part of the country, promote litigiousness, and amass more wealth without labor than the most opulent farmer with all his toils. They have so dexterously interwoven their doctrines and quirks with the laws of the land, or rather they are become so necessary an evil in our present Constitution, that it seems unavoidable and past all remedy. What a pity that our forefathers, who happily extinguished so many fatal customs, and expunged from their new government so many errors and abuses, both religious and civil, did not also prevent the introduction of a set of men so dangerous! . . .

The nature of our laws, and the spirit of freedom, which often tends to make us litigious, must necessarily throw the greatest part of the property of the colonies into the hands of these gentlemen. In another century the law will possess in the North what now the Church possesses in Peru and Mexico."¹

The control and direction of public affairs have, however, remained largely with the members of the bar, and though the present assault on the Nation's life and honor may find its leader in a lawyer, he will not count among his followers those who have trained their minds truly and sternly in the great principles of ethics that find expression in the controlling doctrines of equity and the common law.

Rather will the bar cling to the memory of that young graduate of Harvard, who, dying under forty, an honored member of our profession, had been Mayor of his native city of Cambridge, and Governor of the Commonwealth of Massachusetts, and at whose funeral were quoted his own words: "Truth never lay in compromise, nor success in evasion of responsibility. Let us find the truth, bravely assert it, and trust the cause to conscience and patriotism."

To aid in an effort to elevate the bar and thus increase its influence and power for good is, indeed, to promote the general welfare. If it be true that every one owes a debt to his profession, here is one way of discharging honorably the obligation.

Austen G. Fox,

Member of the New York State Board of Law Examiners.

¹ Letters of James Russell Lowell, Vol. II. pp. 30, 31.

KEENER ON QUASI-CONTRACTS.¹—I.

PROFESSOR WILLIAM A. KEENER'S Treatise on the Law of Quasi-Contracts appeared in 1893, and was deservedly welcomed. It brought to the exploding point the uneasy consciousness of many legal writers that the usual division of obligations into those of contract and those of which the violation is a tort is inadequate, if not erroneous, and it is safe to say that that venerable tradition has been brought by the learned author to a moribund condition from which recovery is impossible. Moreover, the treatise for the first time recognized and formally considered a large class of cases which have not received a sufficient treatment, in our law at least, but which deserve a separate name and a separate classification. The method of the book is excellent and almost unique in our modern juridical literature. It is the method of free and independent, yet respectful, criticism of the decisions, and of such criticism we cannot have a surfeit. With a treatise of so many striking merits it seems almost ungracious to find fault; but in spite of its ability, it seems to me chargeable with certain grave and serious errors, and this is the more regrettable because its very force and original character lend to such errors a great additional vitality. My criticisms are in brief these: *first*, that the title "quasi-contracts" is unfortunate in that it suggests a false analogy; *second*, that the learned author uses it to cover an erroneous classification; *third*, that the proposition with which the learned author is mainly concerned, the proposition, to wit, that "no one shall be allowed to enrich himself unjustly at the expense of another," is, according to the interpretation of the word "unjustly," either a contradiction in terms or else a merely identical proposition from which, though true, no deduction as to the rights of litigants can possibly be drawn; *fourth*, and last, that under the name of unjust enrichment the author has been dealing for the most part with a group of remedies upon the breach of legal obligations, or upon the violation of legal rights, which are afforded by courts of law as distinguished from courts of equity,

¹ A Treatise on the Law of Quasi-Contracts. By William A. Keener, Kent Professor of Law and Dean of the Faculty of Law in Columbia College. New York: Baker, Voorhis and Company. 1893. 8vo, pp. xxxii, 470.

and are in each case alternative with the more usual remedy of damages.

The obligation of the search after truth is but meagrely met by purely destructive or negative criticism. Indeed, such criticism is available only for the purpose of pointing out internal error or self-contradiction. If other error is to be established, it must be through the application of extrinsically established principles, and the search after truth involves, therefore, an imperative obligation to search for these principles and to indicate their true applications, an obligation which this article is an attempt to meet.

I.

In his prefatory note the learned author says: "In substituting the term 'Quasi-Contract' for the term 'Contract Implied in Law' the writer has only followed the lead of Sir Frederick Pollock and Sir William Anson. While under such leadership the propriety of the substitution does not admit of question, the necessity therefor will soon become apparent to the reader;" but in the body of the book no formal explanation of the necessity is anywhere offered, and the reader can find it only by implication. There are given, however, two explanations for the choice of terms. The first is a quotation from Sir Henry Maine showing the use in Roman Law of the adjunct *quasi*¹ in such expressions as *quasi-contract* (*quasi ex contractu*) and *quasi-delict* (*quasi ex delicto*) and pointing out that it negatives the notion of identity, but calls attention to an analogy. It is to be noted that so far as the Roman use of *quasi* is concerned, it was just as applicable in the case of an analogy to torts (delicts) as in the case of an analogy to contracts, and that the learned writer had therefore a choice of terms between quasi-contract and quasi-tort, a choice which would normally be determined by the greater of the two analogies. The passage from Sir Henry Maine, however, affords no criterion for such a choice, nor does the author then indicate a reason for his preference. It is to be found in his second explanation on a later page, in which, after pointing out that the old common-law action of *assumpsit*, which in its essential nature was an action of contract, was by a fiction extended to what are usually called contracts implied in law, but are not contracts at all, the learned writer says:—

¹ Keener on Quasi-Contracts, 6.

"It might be asked: Why did the court extend to this class of obligations the remedies peculiar to contracts rather than the remedies peculiar to tort? The right conferred in quasi-contract, and the right, the violation of which constitutes a tort, undoubtedly possess this common characteristic,—that the obligation is imposed by operation of law, regardless of the consent of the defendant. But treating a tort as the violation of a right *in rem*, the obligations differ in an important particular; for while, to avoid committing a tort, one need only forbear, to discharge the obligation imposed by quasi-contract one must act. It is true that the obligation imposed by a contract may be simply to forbear; but the obligation most generally assumed under a contract requires one to act, and therefore contract, rather than tort, would naturally suggest an analogy. Another consideration would also suggest the analogy of contract rather than of tort: not only in most cases where a quasi-contractual obligation is imposed has the defendant not acted in violation of a right *in rem*, in consequence of which the law could impose an obligation, but in many cases he has either not acted at all,—as, for example, where an absent husband, who is ignorant of the death of his wife, is obliged to reimburse one who has defrayed the expenses attendant upon her burial,—or, if he has acted, has acted with the consent, and perhaps the co-operation, of the plaintiff; as, for example, where a defendant is obliged to refund money which he has received from the plaintiff, both parties acting under a misapprehension."¹

The paragraph begins with a question of history: "Why *did* the court extend to this class of obligations the remedies peculiar to contracts rather than the remedies peculiar to tort?" and the answer should properly take the form of an historical account of the origin and growth of the remedies actually extended to the wrongs under discussion. It is, however, not an historical answer that the question receives, and it may be surmised that the learned author did not put the question he really had in his mind. He seems to have been actually concerned with the reasons for his own terminology rather than with matters of history. At any rate, if this is not the case, not only is no explanation of his terminology given,—except so far as the quotation from Sir Henry Maine is an explanation, and that, we have seen, leaves open a choice of terms,—but the historical question is wrongly answered.²

As a reason for his terminology, the explanation is unsatisfac-

¹ Page 15.

² See Prof. Ames's article on the History of Assumpsit, 2 HARVARD LAW REVIEW 1 and 53.

tory. It first points to a resemblance between quasi-contracts and torts which obtains in all cases of each, to wit, the fact that the obligation is imposed by law without the consent of the parties, and then discards that resemblance as a basis of analogy in favor of another which it admits to obtain in only some cases, to wit, those cases of contract in which the obligation is to act, rather than to refrain from acting. In other words, the analogy is not an analogy with the whole class of contracts at all. Just to the extent, therefore, that the term quasi-contracts points to a class, rather than to an individual resemblance, its use is fallacious. If this were an attempt at scientific classification, such an objection would be fatal. It seems to me equally fatal where, as now, there is a search for that which is a mere analogy, to be sure, but which is yet of a real, not haphazard, character, and intended to indicate a scientific rather than a whimsical classification.

In the paragraph just quoted the learned author indicates another reason why the analogy to contracts is preferred to the analogy to torts, to wit, that

"not only in most cases where a quasi-contractual obligation is imposed has the defendant not acted in violation of a right *in rem*, in consequence of which the law could impose an obligation, but in many cases he has either not acted at all . . . or, if he has acted, has acted with the consent, and perhaps the co-operation, of the plaintiff."

Again, however, he is pointing to an analogy which he expressly says obtains in most cases, and by implication says does not obtain in all. The resemblance, then, is again an individual, not a generic, resemblance, and therefore is not a sufficient basis for a generic analogy. I submit, therefore, that the choice of the name, by the author's own showing, in spite of the weighty authority of Pollock and Anson, is unfortunate.

II.

Unfortunate as is the word quasi-contract as indicating an analogy, it seems to me still more unfortunately used as the name of a class of rights and as a term of classification. The learned writer has himself indicated the true theory of classification in the matter of legal obligations in the following words: —

"It needs no argument to establish the proposition that it is not scientific to treat as one and the same thing an obligation that exists in every case because of the assent of the defendant, and an obligation that not

only does not depend in any case upon his assent, but in many cases exists notwithstanding his dissent."¹

In other words, the learned author has objected to the usual classification, which includes so-called contracts implied in law under the name of contracts, because it neglects the origin or cause of these several obligations for a mere resemblance. The unexpressed major premise of his argument is that all rights and obligations are to be classified according to their origins or causes,—a proposition which in these days of evolutionary science will hardly be denied either in its application to biology or in its application to legal principles. The learned writer, however, has not obeyed his own canons. He classifies the following obligations as all quasi-contractual:—

- "1. Upon a record.
- "2. Upon a statutory, or official, or customary duty.
- "3. Upon the doctrine that no one shall be allowed to enrich himself unjustly at the expense of another."²

The mere enumeration of these various obligations indicates a several origin for each. The first is founded upon the mandate of the court, and depends for its validity upon the right of a court to adjudicate between contending parties. The statutory duty depends upon the mandate of the legislature, which in turn depends upon the right of the community through its legislature or otherwise to prescribe positive duties to its members. The last depends by its terms upon a principle of natural justice, and not upon a mandate of court or legislature. How then can he classify them under one head and maintain a consistency with his own indicated law of classification?

Nothing appears in the subsequent discussion of the nature of the various obligations of quasi-contract to remove the basis of this objection. To consider them in their order, of the obligation founded upon a record he asserts³ that it is quasi-contractual, for the reason that, as pointed out by Mr. Justice Field in a passage which he quotes in full,⁴ it is not founded upon the assent of the parties, and is not, therefore, contractual. Now it is to be noted that the learned author has already pointed out that the obligations of which a breach is a tort are quite as independent of assent as

¹ Page 1.

² Page 16.

³ Page 16.

⁴ *State of Louisiana v. New Orleans*, 109 U. S. 285.

are quasi-contracts.¹ To prove that the obligation upon a record is independent of assent is not sufficient, therefore, to prove that it is a quasi-contract, for he must go further and show that of at least these two classes, quasi-contracts and torts, each lacking that element, it properly belongs to the former. To prove that it is *not* one is no proof that it *is* another. He has in fact committed that logical error technically known as the fallacy of undistributed middle. His syllogism may be stated thus:—

Quasi-contracts are obligations not founded upon assent;

Obligations upon a record are obligations not founded upon assent;

Therefore, obligations upon a record are quasi-contracts.

The class of obligations not founded upon assent, which is the middle term whereby he effects the logical transition from obligations of record to quasi-contracts, is not, to use the technical phrase of logic, distributed,—that is, is not wholly comprised within either of the other two. To make his syllogism sound, he must be willing to say either that quasi-contracts include all the non-consensual obligations that there are, or that obligations of record include them all,—a willingness which in view of his analysis of torts we cannot suppose to be a fact.

It is to be observed, however, that while the syllogism is incorrect, the conclusion is not by this criticism proved to be untrue, for it may actually be that obligations of record are quasi-contracts. The matter of its truth is to be considered later.

Of his second class of quasi-contracts, he gives two examples of statutory obligation,² and his treatment of them is precisely identical with his treatment of the obligation upon a judgment. In each he cites a passage from the opinion of a court, pointing out that the element of assent is wanting, and thence he concludes that the obligation is quasi-contractual. The objection that proof that they are *not* contracts does not prove that they *are* quasi-contracts again obtains. A breach of them, consistently with his argument, may well be a tort. His middle term is again undistributed.

Of customary obligations he instances that of a carrier,³ founded upon the custom of the realm to receive and carry safely, and of an inn-keeper⁴ to receive guests, or to keep their goods safely. He says: "That the liability in such cases arises, not from con-

¹ Page 15.

² Pages 16, 17.

³ Page 18.

⁴ Page 18.

tract, but from a duty, is clear. While it is true that the liability is ordinarily described as one in tort, it is submitted that it has been so described because of the usual classification of legal rights into contracts and torts, and that since the obligation imposed upon the carrier and the inn-keeper is *to act*, the obligation is really quasi-contractual in its nature, and not in the nature of a tort." Again the syllogism is defective, for proof that the obligation is not a tort is not proof that it is a quasi-contract. It may be a true contract. His error is again that of the undistributed middle.

Of his official duties he has only this to say¹: "Of this nature also, it is submitted, is the obligation of a sheriff to levy execution and pay the proceeds to a judgment creditor."

He adduces no argument in support of his position, which seems to be at least questionable. The obligation of the sheriff would seem very largely to depend upon his consent. Of his own free will he enters upon his office, and of his own free will he may leave it. To be sure, he cannot assume the office without assuming its duties; but they are none the less voluntarily assumed. When in pursuance of his office he levies execution, he would seem to be in a position analagous to, if not identical with, a voluntary trustee or bailee holding the proceeds for the benefit of the plaintiff. I submit that it is not at all certain that the obligation does not contain a large consensual element, and may not therefore be rightly classed as contractual.

To the obligation founded upon unjust enrichment substantially the whole treatise is devoted. In his discussion of its nature the learned author restricts himself to showing that it contains no element of assent.² In this he is wholly convincing; but to establish the want of assent is in nowise to establish that the obligation is quasi-contractual, because there may be many obligations not quasi-contractual, such as those of which a breach is a tort, in which that element is lacking. The old fallacy of undistributed middle is again exemplified.

The truth is that in no one of these discussions does the learned author complete a logical argument. In each of them, to make it technically correct, it is necessary to say either that all obligations not founded upon assent are quasi-contracts, in which case quasi-contracts would include torts, or else that all obligations in which

¹ Page 19.

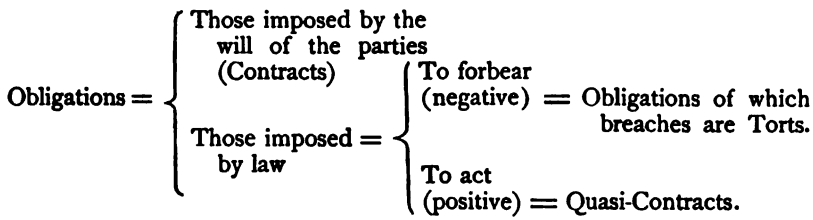
² Page 19.

the duty is to act are quasi-contracts, in which case quasi-contracts would include many contracts. Both of these results the learned author would be the first to deny. It would seem, however, that in each case he had in mind not one, merely, but two, criteria for determining the character of the obligation under discussion,—that is to say, he had in mind not only the criterion of the presence or absence of assent, but also the criterion of the affirmative or negative character of the obligation,—and that he contented himself with applying that one about which there seemed to him to be the most doubt, and left the reader to apply the other. So considered, his reasoning may in each case be fully stated thus: an element in the obligation of contracts is the assent of the parties; an element in the obligation a violation of which constitutes a tort is that the duty is to forbear; in this obligation under discussion neither of these elements appears; it shall, therefore, be relegated to a third class of obligations to which the name quasi-contracts shall be assigned.

This analysis I believe to be a just statement of the author's position. If it is not, I have failed to find the principle upon which he groups such varying obligations under one head. If we assume it to be his true position, it follows that a division of obligations into torts, contracts, and quasi-contracts, is an exhaustive division, that is, it includes under one or the other head all possible obligations. It is valuable also as calling attention to, and successfully combating, the common error that confuses consensual and non-consensual obligations; but it is unscientific, however, as a permanent scheme of classification, because in the residuary class it neglects the elements both of likeness and of common origin, upon one or the other of which all scientific classification is founded, and upon the second of which the learned author, as we have seen, based his objection to the usual classification. His residuary class is only a conglomerate of unrelated obligations, and is not a true class at all. It is as if the animal kingdom were divided into man, monkeys, and all other animals,—which is division, rather than classification.

Another classification, however, may be suggested as that which the learned author had in mind, as follows:

Obligations may be divided into those imposed by the will of the parties and those imposed by operation of law, and the latter may be again divided into those of which the obligation is to forbear and those of which the obligation is to act. Set forth diagrammatically, the division is like this:



Upon this classification, it will be urged, quasi-contracts are not a mere residuary class formed by exclusion from torts and contracts; but are, on the contrary, a true scientific class founded upon a real generic likeness common to all its members, to wit, that they are imposed by law and are to act.

The learned author does not expressly make this classification and, like the other, it is to be gathered, if at all, only by implication. Neither does he say anything to show whether or not, assuming it to be his classification, it is intended to be exhaustive. If, however, it is not intended to be exhaustive, that is, if there are obligations not provided for in its scheme, it is obvious that in any given case an obligation could be brought within one of its classes only by showing affirmatively that it possessed the distinguishing marks of that class. To show negatively, for example, that a specific obligation did not fall either with torts or with contracts, to use, that is, a mere exclusionary method, is not logically sufficient, since it might fall outside of the classification altogether. Unless, therefore, this scheme contains a complete division of obligations, the fallacy of undistributed middle which lurked in all the author's discussion of special cases, such as obligations of record and statutory and other duties, re-appears in a much more fatal form than any which it has hitherto assumed. The author's use of the method of exclusion, however, is an almost conclusive proof that he conceived his divisions to be exhaustive, and therefore this proposed classification does justify his special discussions, not as he wrote them out to be sure, but in their full and complete expression.

The first division of obligations creates two classes, those imposed by the will of the parties and those imposed by operation of law. There is an ambiguity about the phrase, "imposed by law," which the learned author does not attempt to relieve. On the one hand, it may denote the sanction of the law, that is, the aid which the law grants to antecedently existing obligations. In that case, however, it is as applicable to contracts as to any

other class of obligations, and this the author expressly recognizes, when he says: "A true contract . . . exists as an obligation because the contracting party has *willed*, in circumstances to which the law attaches the sanction of an obligation, that he shall be bound."¹ All legal obligations, contractual or otherwise, possess that sanction or else they cease to be legal. In this view, the phrase "imposed by law," being applicable to all obligations of judicial cognizance, ceases to be a valid mark of distinction among any of them, and we are driven to find some other characteristic wherewith to account for the learned author's division. The only distinction which he even indirectly suggests is the element of mutual assent, present in contractual obligations, but absent in all others. If, therefore, I have rightly grasped the author's meaning in the phrase "imposed by law," it would seem that it is inadequately used in this supposed classification and that the terms consensual and non-consensual are the more exact expression of his antithesis. On the other hand, the law may be considered as a source of legal obligations in contradistinction to the will of the parties, and that may be the meaning of the words, "imposed by law." This notion of the law as itself a source of obligation is not very definite and the author certainly does not expressly set it forth. It seems, however, to be hinted at in such a phrase as this "the obligation is imposed by operation of law, regardless of the consent of the defendant;"² but since the author has used it without explanation, except as antithetically opposed to the notion that consent is a source of obligation, and has evidently regarded the two as exhaustively dividing obligations in general, I am forced to believe that by obligations imposed by law no more is meant than obligations not resting upon consent. If that be so, then again an antithesis that would more clearly conform to his thought would be an antithesis between consensual and non-consensual obligations.

It may be insisted, however, that the law is as valid a source of obligation as is the will of the parties and, therefore, equally valid as a criterion of classification, and that in spite of any evidence to the contrary, the phrase "imposed by law" may thus have a positive content of meaning and not the merely negative or exclusionary content which I have indicated. The objection is certainly valid

¹ Page 4. See also Prof. Langdell's article on Equity Jurisdiction, 1 HARVARD LAW REVIEW, at p. 56, and n. 1.

² Page 15.

and a consideration of this suggested meaning is therefore necessary. It brings us back, however, to the indefiniteness of the thought itself. How can the law be a *source* of obligation? It is conceivable of course that the law may impose obligations which have no reason outside of the law itself. Such an obligation would be a legal obligation, having its origin in the law, and in the law alone, and the law might then rightly be called the source of the obligation. Certainly there is no other source. But having no reason, such an obligation would be incapable of explanation and would have no more validity than the power of the government behind it. It would be in fact an arbitrary or tyrannical obligation, and such obligations are not the subject-matter of jurisprudence. This meaning of the phrase "imposed by law" in a science of jurisprudence therefore defeats itself and may be neglected. If, on the other hand, the law acts in each case with a reason, the relation of law to that reason differs in no respect from the relation of law to the will of the parties in the case of legal contractual obligations. The will of the parties is, with those obligations, nothing but the reason of the law. In other words, the reason must exist antecedently to the law and the law is but the sanction of society added to the inherent force of the reason. The result is then that the notion of the law as a source of obligation means nothing more than a sanction applicable to all obligations, consensual and non-consensual alike. By obligations imposed by law, therefore, the learned author can intend only one of two things, either obligations carrying with them a legal sanction, that is, all legal obligations whatsoever, or else, as we have heretofore seen, a class of obligations marked only by the absence of the element of consent.

Now, whichever of these two we take to be the meaning of the phrase "imposed by law," we find the opposition between the two classes which the author has created to rest fundamentally on the presence or absence of mutual assent, with the result that the class in which the assent is absent, the class of obligations imposed by law, that is to say, resolves itself in essence into a mere residuary class, formed on a principle of exclusion and containing within itself no element of generic likeness. But such a class as we have seen is not a true class and is not valuable in scientific classification.

The subdivision of obligations imposed by law into obligations to act and obligations to forbear is logical enough because it is exhaustive, action and forbearance being antithetical and per-

mitting no third supposition; but it falls to the ground with the failure of the prior and main division. There is no scientific advantage to be attained in accurately dividing a mere heterogeneous mass. The futility of such an attempt is precisely exemplified in the following example, which I believe to be an accurate analogue to the suggested scheme of the learned author: Animals may be divided into those which are human and all other animals, and the latter may be again divided into those that are white and those that are colored. In this illustration it will be readily seen that if the class "all other animals" were a true genus, as, for example, the genus bear, white might readily become the true and scientifically valuable mark of a species, as, for example, the white or polar bear, but that as it is, by reason of the insufficiency of the prior division, it has lost any such possible value. So it is with the distinction between positive and negative obligations. It is a distinction which is applied to a class containing, for aught that appears to the contrary, many subdivisions and which may therefore override the lines of subdivision. It may therefore on the one hand group many obligations which on closer inspection would be seen to be quite different and separately classifiable, and on the other may divide obligations which should not be divided.

Assuming, however, that the subdivision into obligations to forbear and obligations to act is possible of interpretation as a division along lines of inherent likeness, I yet incline strongly to the opinion that the class of obligations to act is after all in the learned author's essential meaning not to be so interpreted, but is on the contrary, merely exclusionary. It is to be remembered that he was already furnished with the historical conception of torts as a class by themselves in which the duty was to forbear, and that conception was apparently his starting point. A mere exclusionary process would therefore give him his second class of obligations, obligations to act. Moreover an examination of the obligations which he includes within its limits discloses such a diversity of character as would inevitably suggest further classification, if his object had been to find elements of likeness. Finally his constant use of the process of exclusion as a method of argument lends probative force to the idea that it was his method of classification as well. If this be the correct interpretation of the learned author's theory, as I believe it is, it follows that this suggested method of classification does not differ in any material aspect from that which I had myself deduced from his arguments respecting individual obligations,

because in the last analysis both reduce themselves to the same method, the method of exclusion.

Whether these two theories as to the learned author's classification, however, are or are not substantially identical, I submit not only that the arguments formally adduced by him in support of it are technically insufficient, but also that either theory is substantially unsound and unscientific.

III.

The main purpose of the treatise under review is to explain as a principle of jurisprudence the doctrine of unjust enrichment and thereafter to examine it in its various applications. The learned author does not attempt to justify it or to explain its origin. He assumes without argument that it is self-evidently true and also that it is valid as a juridical principle. This is unfortunate, for weighty reasons may be adduced to prove that neither of these propositions is true.

The learned writer thus states this principle: "No one shall be allowed to enrich himself unjustly at the expense of another."¹ Inasmuch as he is dealing with a proposition of law (using that word in its largest sense as including equity and meaning the whole power of the Courts to remedy wrongs), it is in no degree a perversion of his meaning to mark the fact more clearly by inserting the words "by law" after the word "allowed," so that the proposition will read: *No one shall be allowed by law to enrich himself unjustly at the expense of another.* Indeed this addition is necessary to redeem the proposition from the charge of being ethical merely and not juridical.

It is a valid criticism of the learned author's phraseology that it does not, even as amended, fully convey his meaning. He has stated¹ that the obligation of which he treats is affirmative, not negative, requiring an active performance, not a passive forbearance, and it is by this mark that he distinguishes it from torts. His proposition on the other hand, the form into which he casts his juridical principle, is a mere prohibition, to which conformity is, as he says of torts, only forbearance. This point seems to have escaped him, for he does not define the active duty, leaving it, on the contrary, to be inferred by his readers.

Taking the proposition as it stands, however, it is open to a still more fundamental objection. If it be true that no one shall be

¹ Page 16.

allowed to enrich himself unjustly at the expense of another, it is also true that no acts whereby one does so unjustly enrich himself at the expense of another are allowed by law, or to state the proposition conversely, all such acts are by law forbidden. The proposition may therefore be stated in this form: *Acts whereby one unjustly enriches himself at the expense of another are forbidden by law.* Now that which the law forbids is illegal. The very definition of illegality is the quality or condition of being in contravention of law. Our proposition may therefore undergo another transformation and, still with no change of sense, become: *Acts whereby one unjustly enriches himself at the expense of another are illegal.* In this proposition the verb "enriches" states the doing of an act while the adverb "unjustly" qualifies it by stating the mode of the doing. To state the same act by a noun and to qualify it by the corresponding adjective is a common substitution and involves no change of meaning. To make such a substitution in the present case will give the proposition this form: *Acts of unjust enrichment of one at the expense of another are illegal.* But acts of unjust enrichment are acts *resulting in* unjust enrichment and if the act is illegal, so is the result. Indeed it is almost tautological to say "acts of unjust enrichment," for an unjust enrichment is itself an act. The proposition may then be reduced to its lowest terms as follows: *The unjust enrichment of one at the expense of another is illegal.* It is extremely unlikely that the exact identity of this proposition with the proposition as enunciated by the author would be disputed, for it is apparent on the face of the matter; but I have been thus particular in setting out the various transpositions in order to avoid the possibility of error. The proposition as it now stands is in the normal form of a juridical principle, in which the subject should define a general class of acts and the predicate should define their juridical quality. Now it is to be noted that in the present form, as well as in all the transmutations, the word "unjust" is of the essence. It is not true that a man may not enrich himself at another's expense, because that he may, legally and rightfully and intentionally. Thus it requires no authority to prove that an innocent purchaser for value may enforce against the maker a promissory note which after the purchase he learns to have been procured by fraud and imposition. That is enriching himself at the expense of the maker, but the enrichment is neither unlawful nor unjust. It is necessary, therefore, to consider the meaning of this word unjust.

It is generally conceded, and it is undoubtedly true, that the forum of the law is not of equal jurisdiction with the forum of the conscience, and that some acts may be ethically unjust which are yet permissible in law. Unjust acts may be therefore either unjust and legal or unjust and illegal. This difference may be indicated in our proposition, which will then take on either of these two forms: —

1. The unjust and *legal* enrichment of one at the expense of another is illegal.
2. The unjust and *illegal* enrichment of one at the expense of another is illegal.

In the first of these two propositions, if it be laid down as a principle of jurisprudence, the law is made to characterize the act according to its standards in one way in the subject, that is, to declare it legal, and to characterize the same act by the same standards in a contradictory way in the predicate, that is, to declare it illegal. The word "unjust" does not in any way relieve the conflict between subject and predicate, and may therefore be neglected. The first proposition then reduces itself to a contradiction in terms.

The second proposition is obviously true. An illegal enrichment is of course illegal. Such a proposition, however, subserves no useful purpose. It is like the equation in mathematics, $A = A$, from which no deduction can be drawn, being in truth only a seeming equation. There are not in fact two objects which are equated, because the apparent equation means only that the thing equals itself, that is, there is only one object of contemplation. Such a proposition is entitled in logic an identical proposition and is recognized as true, but also as logically valueless. It is a truism, rather than a truth.

The proposition, therefore, with which the learned author began, No one shall be allowed to enrich himself unjustly at the expense of another, reduces itself according to the interpretation of the word "unjustly," either to a contradiction in terms or else to a mere identical proposition, and in either case cannot ever be a true principle of jurisprudence. The first form of the proposition, being a contradiction in terms, self-evidently cannot become such a principle. The second is equally valueless, but for the different reason that no conclusion can ever be drawn from an identical proposition. This can be demonstrated in the present instance if an attempt is made to use the proposition as a guiding principle or reason of deciding any particular concrete case.

In any controversy in which the proposition can be referred to as a guide to its decision, one of the parties to it alleges the existence of a state of facts from which he draws the conclusion that the other or one of the others has been unjustly enriched at his expense, and he claims appropriate relief. The opposing party denies the allegations or disputes the conclusion to be drawn from them. If the decision of the controversy be in favor of the alleging party, it is clearly no answer to the defeated party to say that he is defeated *because* he has been unjustly enriched at the other's expense. So to answer would import into the reason the very matter in dispute, which is a clear begging of the question. Similarly, if the decision be against the alleging party, it is no answer to him to say that he is defeated *because* the other has not been unjustly enriched at his expense. The matter in dispute is again drawn into the reason and there is another begging of the question.

In either case the proposition is not a reason at all. That is the very vice of the *petitio principii*, which, more or less plausibly, purports to give a reason, but fails. It is a mere repetition of a prior assertion and is but one form of an identical proposition. To use the proposition therefore as a reason is only to say, The plaintiff ought to recover, because he ought to recover, or to say, The defendant ought to prevail because he ought to prevail.

There is only one other way in which the proposition can, even in appearance, be given as a reason or put to practical use and that is by ascertaining the reason why the acts in question are just or unjust and then ascertaining the obligation of the parties by the standard of justice so obtained. In that event, however, the real reason of deciding is, not the proposition, but this extrinsic standard. This is true, even if the proposition be used as a sort of middle term, in actually rendering the reason. Thus to say to the defeated party, when the decision of the controversy is against him, that he is unjustly enriched at the other's expense because (to take an example) he has obtained money from the other by a false statement of fact, is merely to import an unnecessary term. It is in effect to say, you ought to be defeated because you ought to be defeated because you obtained money by false pretences. Resorting again to the simile of an equation, it is like saying, $A = A = B$. The middle term in both cases is unnecessary and should be neglected as not actually used.

If the argument has so far proceeded correctly, it follows that the doctrine of unjust enrichment, even in its most valid statement, is

incapable of a real application as a principle of jurisprudence, and that if the attempt is made so to use it, the attempt results either in begging the question or else in a more or less conscious resort to some other and extrinsic principle. An examination of the treatise under the review is an empirical proof of the justness of this conclusion. In each discussion one or the other of these two errors is exemplified. Thus the former is illustrated in the following passage¹: —

“In *Farmer v. Arundel*² the plaintiff sought to recover money which he had paid the defendant for the support of a pauper, supposing that the defendant, who had supported the pauper, had a right to call upon him for reimbursement. It was held that regardless of the defendant's right to demand payment, there could be no recovery, since it was not against conscience for the defendant to retain the money so paid. De Grey, C. J., said: — ‘When money is paid by one man to another on a mistake either of fact or of law, or by deceit, this action will certainly lie. But the proposition is not universal that whenever a man pays money which he is not bound to pay he may by this action recover it back. Money due in point of honor or conscience, though a man is not compellable to pay it, yet if paid, shall not be recovered back, as a *bona fide* debt, which is barred by the statute of limitations. . . .

“‘Admitting, therefore, that the money could not have been demanded by the defendant (which it is not now necessary to decide), yet I am of the opinion that it is an honest debt, and that the plaintiff having once paid it shall not by this action, which is considered an equitable action, recover it back again.’”

If this passage is analyzed, it will appear that the only reason stated by the learned author is that it was “not against conscience” for the defendant to keep the money, and that the only reason stated by the Chief Justice is that “it was an honest debt.” The sum and substance of these reasons is only this, that the plaintiff ought not to recover. Was not this the very matter in issue, and did the plaintiff receive a sufficient answer, or any answer at all, to his arguments to the contrary?

The following passage illustrates the reference to extrinsic principles³: —

“This suggestion [not now material] presents for consideration the theory upon which a plaintiff who has a right to sue for a breach of contract is allowed to sue in *indebitatus assumpsit*. If this right is to be

¹ Page 43.

² 2 Wm. Bl. 824.

³ Page 299. — The italics are mine.

given a plaintiff, it would seem to be for the reason that the defendant should not be allowed to blow hot and cold, and to profit by a contract the burdens of which he refuses to perform. The obligation imposed by law in such a case then should be that the defendant make restitution in value to the plaintiff of that which he received. *On no other theory can the count for money had and received which does not sound in damages be maintained."*

This is an excellent statement of the obligation of restitution upon a breach of contract. The obligation is explained, however, not by the doctrine of unjust enrichment, but rather by the proposition that the defendant cannot occupy two inconsistent positions at one and the same time, that is, that having by his refusal to perform denied his obligation, and the plaintiff having accepted the situation by demanding back the consideration paid, by the act of both parties the contract is rescinded, and the defendant cannot alone, without the plaintiff's consent, reinstate it.

I desire to redeem myself from the charge of disputing about unessentials. It is a pity that logical accuracy should ever be deemed a matter of small moment; but beyond a doubt it is often so regarded. Apart from any question of logical accuracy, however, a decision which begs the question is a decision without a reason, which, *even if right in the particular case*, may become through its force as a precedent the source of grave error. Nobody can count the evil results of our right decisions wrongly reasoned. The chance, however, of achieving truth by means of error is remote, and the requirements of practical justice demand that a doctrine of such wide application as that under discussion, should be rigorously and severely tested.

IV.

We have seen, if the argument is so far valid, that the doctrine of unjust enrichment is either a contradiction in terms or an identical proposition; and that in either case, it is inapplicable to the decision of a concrete controversy as a principle of jurisprudence. We have further found that if the attempt to apply it is actually made, the attempt results either in a begging of the question or in a reference to some other and logically anterior principle which thereby becomes the real reason for deciding, while the doctrine itself is to be rejected as a redundant link in the chain of reasoning. From this dilemma the learned author never quite escapes, as indeed he could not, so long as he retained his original assump-

tion of the validity of his proposition. The gravity of this error should not be underestimated; but at the same time it is but just to the author to point out that in the majority of his discussions, and even in the wording of his general principle, he has referred, implicitly or explicitly, to a logically prior principle, and that in a criticism of his work upon the merits, full account of that principle should be taken. Now the sound thesis and the one upon which Professor Keener really built I conceive to be this: that there is a remedy, differing from, but alternative with, damages, granted by courts of law upon legal wrongs; that the process of reasoning by which the right to this remedy is established varies with the original right that is violated; but that, the remedy being established in the case of each right, it can be shown that it is quantitatively identical in all cases, and can, therefore, be conveniently called by a single name. For this remedy restitution seems to be the most apt designation. Justice to the learned author, as we have seen, requires that in addition to the formal criticisms which have been urged against his treatise, there should be a further discussion of this thesis, and in the remaining pages of this article, therefore, I shall venture to offer a theory of restitution and then to criticise the author's theory by that as a standard.

What, then, is the remedy of restitution?

Everett V. Abbot.

NEW YORK, 1896.

(To be continued.)

LIABILITY OF MASSACHUSETTS STOCKHOLDERS IN FOREIGN CORPORATIONS.

THE liability of a Massachusetts stockholder, in a corporation organized in another State, to the creditors of the corporation has been directly passed upon by the Supreme Court of Massachusetts in some half-dozen cases. It has been discussed in various *dicta* of as many more cases. The first and leading case is that of *Erickson v. Nesmith*,¹ which came before this court in two different forms, and was subsequently brought before the Supreme Court of New Hampshire. A creditor of a corporation organized under the laws of New Hampshire sought to enforce a personal liability for debts of the corporation against a stockholder in Massachusetts, by an action of contract in the Massachusetts courts. The statute of New Hampshire creating the liability prescribes that "all legal proceedings hereafter commenced against any individual stockholder in any corporation in this State for the collection of a debt against said corporation shall be by a bill in chancery and not otherwise."

The Massachusetts court, in sustaining a demurrer to the declaration, said that the laws of a foreign State operate here only by comity. Our courts "will not suffer foreign laws or statutes to work injury or injustice upon [our] own citizens, nor permit [our] tribunals to be used for the purpose of affording remedies which are denied to parties in the jurisdiction of the State that enacted the law. . . . The liability on which the present action is founded is created solely by the statutes of the State of New Hampshire."

Subsequently the same plaintiff brought a bill in equity, in behalf of all creditors who wished to join, against the same defendant and any other Massachusetts stockholders, to enforce the same liability. The Massachusetts court sustained a demurrer to this bill also, for the reason that they had no jurisdiction that would reach such a corporation, out of this Commonwealth and having no assets here, or the creditors or stockholders residing elsewhere. The purpose of the statute was that the court should "hear and adjust all conflicting questions as to the indebtedness of the cor-

¹ 15 Gray, 221; 4 Allen, 233; 46 N. H. 371.

poration who were stockholders, and what were the equities between them."

Such was the interpretation of the statute by the New Hampshire court in the case of *Hadley v. Russell*.¹ That interpretation should be followed in this State. "When the statute creates a right and prescribes a remedy, that particular remedy and that only can be pursued." These two decisions of *Erickson v. Nesmith* were approved in New Hampshire when the same plaintiff brought a bill there to enforce the same liability, joining all the creditors and stockholders.

The principles upon which these decisions were based seem to be the following: —

1. The stockholder's liability is created solely by statute.
2. The particular remedy prescribed by that statute must be pursued.
3. The courts of Massachusetts will not permit such foreign statutes to work injustice to our own citizens.
4. Such statutes can operate here only by comity.

These principles have been adhered to in succeeding cases, and are submitted as a statement of the law of Massachusetts to-day.

The foundation of the stockholder's liability to the creditor is of course contractual. This was nowhere stated by the Massachusetts court in the decisions of *Erickson v. Nesmith*, but was undoubtedly assumed. It was, however, distinctly stated in the case of *Hutchins v. N. E. Coal Mining Co.*,² a case decided in the same year as the second of those cases. There the court say: —

"The right of creditors to recover a judgment against a corporation for the amount of their debts, and to take out execution on which, in certain contingencies, the private property of stockholders might be taken, was one of the attributes or properties of its legal existence, by virtue of its charter, of which it did not and could not divest itself by entering into contracts in other States. On the contrary, such contracts must be presumed to have been made with reference to this very liability. Certainly the corporation and its stockholders are estopped from denying it."

This was a case where a creditor, living without the State, brought suit to enforce in our courts the liability of resident stockholders in a Massachusetts corporation. This he was permitted to do. This case dealt with the rights of a foreign creditor of a Massachusetts corporation.

¹ 40 N. H. 109.

² 4 Allen, 580, 583.

The next attempt to enforce here the liability of a stockholder in a foreign corporation was made by a creditor of a New York corporation. An action in contract was brought under the provisions of the New York statutes, making the "trustees" of a company liable for its debts in case a report of the condition of the company was not filed within twenty days after January 1st in each year. The plaintiff was not permitted to recover.¹ Two chief grounds were assigned for the decision: first, that the New York statute was penal in its character, and so could not be given extra-territorial operation nor enforced by comity; second, because the plaintiff's claim was outlawed under the terms of that statute, and the defendant's liability had ceased to exist in New York.

The first reason given was based upon the decisions of the New York court construing the statute as a penal statute; but this construction seems to have been reversed by the later decisions of that court, and is at variance with the decisions of the United States Supreme Court.² On that ground a different result might be anticipated to-day. The second reason given for the decision was conclusive in that case, as the plaintiff had not brought himself within the terms of the remedy provided by the New York statute.

In *New Haven Horse Nail Co. v. Linden Spring Co.*,³ the law of Connecticut was involved. A bill in equity was brought by a creditor of a Connecticut corporation against the corporation, as having its usual place of business in Boston, and against the individual stockholders, who were all citizens of Massachusetts. The bill alleged that "under the laws of Connecticut, according to the ordinary rules of equity, and independently of any statute, if a stockholder has not paid up the face value of his stock in full, he can, upon the insolvency of the corporation, be made personally and directly liable" to a creditor thereof.

This allegation was interpreted by the court to mean that the alleged obligations of the subscribers to stock is "independent of any statutory or penal liability which is expressed in terms." It is derived from the relation of the stockholder to the corporation under the laws of Connecticut. "It is of a peculiar character, involving the organic law by which the corporation is created, and

¹ *Halsey v. McLean*, 12 Allen, 438.

² *Flash v. Conn.*, 109 U. S. 371; *Huntington v. Attrill*, 146 U. S. 657.

³ 142 Mass. 349.

requiring local administration." The court declined to take jurisdiction of the bill. The bill did not set out a statutory liability but claimed that equity jurisdiction existed under such circumstances by the law of Connecticut. The Massachusetts court say, in effect, that this is such an unusual ground of equity jurisdiction, and depends so much upon the law governing the creation of corporations in Connecticut, that it is justified in declining to take jurisdiction. There was no judgment against the corporation prior to bringing the bill, and the law of Connecticut was not set out with adequate allegations. To enforce a bill founded on such grounds, which were no foundation for equity jurisdiction under the law of Massachusetts, would be an injustice to the citizens of Massachusetts who were made defendants. No statute of Connecticut was actually invoked by the plaintiff, or considered by the court.

Under the decisions discussed in the foregoing pages, the policy of the Massachusetts courts seemed to be established, denying the right of creditors of foreign corporations to enforce here a statutory liability against resident stockholders. It was so regarded by the Massachusetts Supreme Court, as appears from the following *dictum* in the case of *Smith v. Mut. Life Ins. Co.*¹: "No proceeding at law or in equity will lie to enforce the individual liability for corporate debts imposed upon officers or stockholders by the laws of another State in which the corporation is established."

But this was not the inevitable or logical conclusion from the cases decided. The principles laid down by the court in those cases seem perfectly sound. No case had been presented where the remedy prescribed by the statute creating the corporation was such as could be availed of in Massachusetts; it was too much to say, though, that no such case ever could be presented. This was later the conclusion of the court, as appears in a *dictum* in a subsequent case, *Post & Co. v. Toledo R. R.*,² when they say: —

"The difficulty which courts find in dealing with foreign corporations in matters relating to their internal affairs and management, the impossibility of compelling persons to perform their obligations, unless either the bodies or the property of such persons can be attached, the intimate relations existing between the States of the United States, and the well known fact that corporations are frequently organized by the citizens of one State under the laws of another and the principal offices of the cor-

¹ 14 Allen, 336, 342.

² 144 Mass. 341, 344.

poration kept in a State other than that of their creation, all induce us to give whatever aid the principles of law permit to persons who are endeavoring to enforce the obligations which attach to stockholders in foreign corporations."

Such was the status of this question, when the case of *Bank of North America v. Rindge*¹ was decided. In this case the plaintiff was a corporation of the State of New York, and a creditor of a Kansas corporation. The defendant was a resident of California, who, being found in Massachusetts, was sued here in an action of contract, as a stockholder in the Kansas corporation. The plaintiff undertook in the declaration to state the law of Kansas respecting such a stockholder's liability; but failed to state the law clearly or fully. The court sustained a demurrer to the declaration in the following language:—

"Limiting our decision to the facts now before us, it is this. That a resident of the State of New York cannot maintain in the courts of this State an action against a resident of the State of California, to establish his personal liability as a stockholder of a corporation organized in the State of Kansas, and having no place of business in this State, for a debt of that corporation to the plaintiff, under laws of Kansas such as are set forth in the declaration, providing for a certain special and limited liability on the part of stockholders, when no judicial proceedings have been taken in Kansas to ascertain and establish the liability of the defendant as such stockholder."

The court further stated several particulars in which the law of Kansas was not set out in the declaration, and added:—

"It is to be regretted that we are not at liberty to determine the case upon an examination of the statute of Kansas, with the assistance of any construction which may have been put upon it by the courts of that State. But we must take the case as the parties present it to us."

Great emphasis was thus laid upon the principle that the law of another State is a matter of fact in the courts of Massachusetts, and must be proved or pleaded like any other fact. In the light of that principle, however, the decision seems manifestly correct. The defendant in this case owed the plaintiff no obligation by the common law or the statutes of Massachusetts. Apart from the Kansas statutes creating the liability, the defendant had made no

¹ 154 Mass. 203.

contract with the plaintiff. Therefore the plaintiff, in not setting out the Kansas law in its declaration, failed to state a legal cause of action.

The court did not proceed on the ground that the suit was to enforce a penalty, or was opposed to the policy of our laws, but distinctly repudiated such grounds for the decision. It did, however, reiterate the ground stated in former decisions, that this was a case "in which complete justice can only be done by the courts of the jurisdiction where the corporation was created."

This decision still left open the possibility of an action in our courts, under a statute providing a remedy that was transitory, upon a declaration stating fully all essential points of law regarding the statute, with the interpretation of that statute by the courts of the State where it was enacted.

The Massachusetts Supreme Court in a recent decision has sustained such a declaration, and overruled the defendant's demurrer. In the case of *Hancock National Bank v. Ellis*,¹ the court construe the declaration as follows: —

"It is averred, in substance, that under the statute of Kansas, as interpreted by the decisions of the Supreme Court of that State, the liability of the defendant as a stockholder is a contractual liability, and arises upon the contract of subscription to the capital stock made by the defendant in becoming a stockholder, and that in subscribing to said stock and becoming a stockholder he thereby guaranteed payment to the creditors of an amount equal to the par value of the stock held and owned by him, which should be payable to the judgment creditors of said corporation who first pursued their remedy under the statute; and that an action to enforce said liability is transitory, and may be brought in any court of general jurisdiction in the State where personal service can be made upon the stockholders."

The court again states the principle, that the stockholders' liability must be determined according to the law of Kansas, as that law is set out in the declaration. If that law is accurately stated, then jurisdiction exists here to enforce the liability like other debts. The court also calls attention to the fact that the case stated in the declaration is different from any case heretofore presented to it, and sets forth a liability "as upon a contract which is suable anywhere." This is undoubtedly the determining principle in the case, that the remedy prescribed by the Kansas stat-

¹ 166 Mass. 414, 418.

utes for enforcing the stockholders' liability is an action of contract to be brought against the stockholders severally. As such, it can be enforced anywhere. That is the interpretation of the Kansas statutes by the Kansas Supreme Court, and that is binding upon all other courts.

In the light of these later decisions, therefore, the following principles should be added to those already deduced as governing our courts in these cases, in order to frame a successful declaration.

5. The laws of the State creating the liability, both the statute law and the judicial interpretation thereof, must be pleaded as facts.

6. The remedy prescribed by such laws must be transitory.

Although it is generally stated that the statutes of other States creating a stockholder's liability can operate in Massachusetts only by comity, it may be that such statutes have a stronger claim for recognition here. It may be that they come within the protection of the United States Constitution, Art. IV. Sec. 1, which provides that "Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof." It was said by Waite, C. J., in *Chicago & Alton Ry. v. Wiggins Ferry Co.*,¹ that this clause "implies that the public acts of every State shall be given the same effect by the courts of another State that they have by law and usage at home." The case of *Huntington v. Attrill*,² *Glen v. Garth*,³ and *Flash v. Conn*,⁴ would seem to support that contention.

It may be also that such statutes as those of Kansas come within the meaning of section one of the Fourteenth Amendment to the United States Constitution, which provides that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

Inasmuch, however, as the Supreme Court of Massachusetts now seems ready to take cognizance of such cases by comity, when they are properly presented, it is unnecessary to invoke the aid of the United States Constitution.

William Reed Bigelow.

BOSTON, 1896.

¹ 119 U. S. 615, 622.

² 146 U. S. 257.

³ 147 U. S. 360.

⁴ 109 U. S. 371.

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THE LAW SCHOOL. — The following table shows the registration in the School on November 15th for eight successive years: —

	1889-90	1890-91	1891-92	1892-93	1893-94	1894-95	1895-96	1896-97
Third year	50	44	48	69	66	82	96	93
Second year	59	73	112	119	122	135	138	179
First year	86	101	142	135	140	172	224	169
Specials	59	61	61	71	23	13	9	31
Total	254	279	363	394	351	402	467	472

The new requirements for admission are now in force for the first time, with a most gratifying result. Counting specials, 176 of the men who enter this year are eligible for regular standing under the new rules, as against 178 last year. On the other hand, there are but 24 among those entering who are not entitled to regular standing, while last year there were 53. The falling off shown in the table is, therefore, practically confined to the class of men against whom the new rules are aimed. The third year class, it will be noticed, is slightly smaller than last year. The actual percentage of second year men not returning is 36, as against 30 last year, 34 and 44 respectively in the two years preceding. The second year class fares better. Only 23 per cent of its members fail to return, as against 28, 24, and 27 respectively in the three years preceding. These figures, which would seem to indicate that a third year of study is even now not regarded with favor, are to be explained by reference to the hard times, for, while not looked upon as absolutely essential, a third year is coming to be more and more regarded as a great advantage. The above percentages are not based on the total registration as shown in the tables, for men admitted to advanced standing are of course included there. The number of these men has steadily decreased until this year there are none.

Below are given the usual tables showing the sources from which seven successive classes have been drawn, both as to previous college training and as to the geographical districts from which the students have come:—

Class of	HARVARD GRADUATES.			Total
	From Massachusetts.	New England outside of Massachusetts.	Outside of New England.	
1893	34	1	19	54
1894	30	2	17	49
1895	32	4	13	49
1896	23	7	17	47
1897	27	2	15	44
1898	42	1	25	68
1899	45	6	19	70

Class of	GRADUATES OF OTHER COLLEGES.			Total.
	From Massachusetts.	New England outside of Massachusetts.	Outside of New England.	
1893	5	9	21	35
1894	7	20	38	65
1895	8	14	30	52
1896	14	11	45	70
1897	9	12	56	77
1898	19	23	62	104
1899	21	12	45	78

Class of	HOLDING NO DEGREE.			Total.	Total of Class.
	From Massachusetts.	New England outside of Massachusetts.	Outside of New England.		
1893	4	1	7	12	101
1894	20	1	10	31	142
1895	16	3	14	33	135
1896	10	4	9	23	140
1897	26	7	16	49	170
1898	25	2	25	52	224
1899	11	2	8	21	169

The following thirty-five colleges have conferred their first degrees on members of the entering class, the figures indicating the number of men from each college, where more than one: Amherst (9), Yale (9), Princeton (7), Brown (6), Bowdoin (4), Leland Stanford (4), Bates (3), Cornell (3), De Pauw (3), Dartmouth (2), Knox (2), Mass. Institute of Technology (2), Union (2), University of Alabama, Boston College, University of California, University of Chicago, Colgate, Dalhousie, Georgetown, Hillsdale, Holy Cross, Iowa, Johns Hopkins, Lake Forest, Louisiana, McGill, Middlebury, Oberlin, Ohio State University, Trinity, Vanderbilt, University of Vermont, Williams, and North Western.

A significant fact, showing a continued increase in the earnestness of the men who come to the School, is that the percentage of men withdrawing or not taking examinations very steadily decreases. Last year but eight per cent of the first year and three per cent of the second year men were placed in this list.

PREFERENCE OF VETERANS IN THE MASSACHUSETTS CIVIL SERVICE.—The Supreme Court of Massachusetts, having disallowed as clearly unreasonable the proposition that any veteran, however unfit, must have any office, however necessary its duties might make fitness (*Brown v.*

Russell, 166 Mass. 14; see 10 HARVARD LAW REVIEW, 119), the Legislature has tried again. That it should do this so promptly suggests the spirit of Mr. Theodore Roosevelt's contemporary in the New York Legislature who "did his best not to allow the Constitution to come between friends"; but it has this difference, that a real and satisfactory attempt has been made to avoid the faults which vitiated the earlier law, and the result seems to be a preference which can honorably be advocated and justified. And such is the opinion of the majority of the Supreme Judicial Court which the Legislature has obtained on the validity of the new law (44 N. E. Rep. 625).

"The General Court may have been of the opinion," say the majority of the court, "that a person who had served in the army . . . would be likely to possess courage, constancy, and habits of obedience and fidelity, which are valuable qualifications for any public office or employment." Whether this is in fact the intention, and will in fact be the result of the law, are questions which are not for any court to decide, and questions which the majority rightly do not take up. It would seem that the minority (Allen, Lathrop, and Barker, JJ.) put it too strongly when they say that the new law (chapter 517 of 1896) "involves a compulsory disregard of actual fitness." The distinguishing and saving difference of the new law is that every appointee, be he veteran or no, must pass his examination; he must exceed that minimum which the Civil Service Rules fix as a sufficient test of knowledge. Then, and then only, the very arguable proposition that his service may help to fit him is to come into play. Whether or no one approves such a law, it would seem to be well within the bounds of any liberal interpretation of the Massachusetts Constitution. There is indeed one section of the new law (§ 3) which would make it possible for an appointing officer deliberately to disregard his duty; but the court having determined that with a proper construction it merely leaves the responsibility with him, without requiring him to consider anything but capacity, the section is as easy to sustain as the rest, whatever loopholes it may have been meant to leave.

CERTAINTY AS A FORMAL REQUISITE OF NEGOTIABLE PAPER. — Two cases recently decided on the same day by the Supreme Court of Michigan afford excellent illustrations of the sort of certainty that is to-day regarded as requisite in negotiable paper. In *Brooke v. Struthers*, 68 N. W. Rep. 272, a provision in a mortgage, that, if the mortgagor should leave any taxes unpaid for thirty days, such taxes and the principal and interest of the note accompanying the mortgage, should at once become payable, was held to render the note non-negotiable. In *Wilson v. Campbell*, *Ibid.* 278, under similar circumstances, the note was held to be negotiable, because, at the time of its execution, there was a statute in existence requiring the mortgagor to pay the taxes, and hence the stipulation in the mortgage added nothing to the amount payable on the note.

That a note and a mortgage executed at the same time must be construed together, is well settled. Daniel on Negotiable Instruments, § 156. The two cases are distinguishable only on the ground that the element of uncertainty in the amount payable on the note, which existed in the first case, was not present in the second. In uncertainty of the time of payment, the cases are alike. As an original question of princi-

ple, this uncertainty should have rendered both notes non-negotiable. When the time of maturity depends on extraneous facts, and cannot be ascertained from the face of the note, difficulties arise which are readily apparent. But these difficulties have had little or no weight in the courts of America and England. Such common instruments as demand notes are open to objection on this ground. Analogous to the Michigan cases under discussion is a series of decisions, beginning with *Carlton v. Kenealy*, 12 M. & W. 139, and including the recent cases of *Merrill v. Hurley*, 62 N. W. Rep. 958 (S. Dak.), and *Stark v. Olsen*, 63 N. W. Rep. 37 (Neb.), which establish that where the principal or interest of a note is made payable in instalments, with a provision that the face of the note shall become due in case of default in the payment of any instalment, the note is not rendered non-negotiable. It would seem, therefore, to be too late to object to a note on the ground that inspection will not reveal whether or not it is overdue. The doctrine that it is sufficient if the instrument is payable at a time that must certainly come, is now firmly established in our law. There is, to be sure, one class of cases, of which *Smith v. Marland*, 59 Iowa, 645, is an example, that seem in reality inconsistent with this. But the doctrine is not expressly repudiated, for the courts rest their decisions on the ground of uncertainty in the amount payable on the notes. Uncertainty of this sort is as fatal to negotiability to-day as ever, notwithstanding the recognition of notes providing for payment of attorney's fees, cost of collection, etc. Those cases where the additional promise is merely to facilitate collection go as far as is justifiable. Although *Brooke v. Struthers*, *supra*, has been criticised as resting on narrow grounds, and as being at variance with modern business methods, it seems to have been an entirely correct decision under the present state of the law.

COMMON LAW PLEADING. — "And, so long as written pleadings remain, the best masters of the art will be they who can inform the apparent licensee of the new system with that spirit of exactness and self-restraint which flows from a knowledge of the old." Thus, in his address to the American Bar Association at Saratoga last summer, Sir Montague Cracken-thorpe, Q. C., spoke with reference to the utility of the study of common law pleading, swept away in the wave of legal reform, which resulted in the English Judicature Act of 1873. Since that time the matchless precision of the old system, the growth of centuries of legal experience, has been replaced by a looseness of which the chief effect is to put a premium on ignorance and sloth. Common law pleading was the mill of justice in which an undefined, obscure mass of fact was ground down to clear and distinct issues. All the parts of this admirable machinery, each logically developed to this single end, worked in harmony to its accomplishment. In consequence, the court could ascertain the steps of law by reference to an intelligible record, the counsel each knew exactly what he must stand ready to prove, and the jury were required to hear evidence only on the definite issue of fact reached.

In the hands of those who understood it, the system was infallible in attaining the purpose for which it existed. If all who brought causes to trial had possessed a proper acquaintance with this branch of law and a reasonable mental alertness, it would never have been hinted that pleading was a means of turning the decision of a question from "the very

right of the matter" to immaterial points. But pleaders of inferior and slovenly mental disposition suffered themselves to be misled, deliberately it is to be feared, by their more acute brethren; and the popular mind came to consider the whole system a mere series of traps and pitfalls for the unwary, — an impediment to justice that must be abolished. In truth, even these evils might well have been remedied by allowing free liberty of amendment, and reducing to a moderate sum the costs payable on the grant of such privilege. Those concerned in reform movements, however, often lose sight of their real object in a feverish anxiety to "cut deep" and at once; and this explains why the system for bringing a cause to trial in convenient and exact form was discarded. There can be no question that the study of common law pleading affords refined and keen intellectual exercise, and those who believe that "order is Heaven's first law" will insist, with Sir Montague Crackenthorpe, that it is still of practical benefit.

THE SELDEN SOCIETY. — If the plan should meet with sufficient encouragement and support, the Selden Society may undertake a complete edition of the Year Books. The Secretary and Treasurer for the United States, Mr. Richard W. Hale, of 10 Tremont Street, Boston, would be glad to receive any expressions of American opinion on the subject which might help in determining the course of the Society.

Proofs of parts of the Society's volumes on Early Equitable Records and Admiralty records (the second volume on the latter subject) are already on this side of the water; but it is difficult, as usual, to fix any certain date for final publication. Some of the early equity cases show a curious resemblance to the recent use of injunction proceedings in the demands which are made on the chancery power for the preservation of the peace. In a case of A. D. 1410, the petitioners allege "that the said William Ralph and Thurston [defendants] and others of their assent and covin have so seriously menaced the said suppliants from day to day of life and limb that they dare not pass their town nor work in the office that they have to do to the use of our said Lord the King nor about their own business for fear of being killed or murdered by the said evildoers." This is of course nothing new about early equity, but it comes at a time when the comparison naturally occurs to one. There is also a bill to enjoin a libel against a clergyman on the (seeming) ground of irreparable evil to the Holy Church. Among the Admiralty proofs may be found a plea of deviation to a policy of insurance in 1547. There is every indication of two interesting volumes.

PHYSICAL SUFFERING RESULTING FROM MENTAL SHOCK. — A decision of high authority has recently been added to the controversy started by the case of *Victorian Railways Commissioners v. Coultas*, 13 App. Cas. 222, concerning what is generally and improperly known as "mental suffering." Last June the English Court of Appeal held that a plaintiff who became physically incapacitated for work through mental excitement and fright could recover under the terms of a policy insuring him "absolutely for all accidents, however caused, occurring . . . in the fair and ordinary discharge of his duty." *Pugh v. London, Brighton, and South Coast Railway Co.*, [1896] 2 Q. B. 248. Lord Esher, M. R., expressly distinguished the *Coultas* case (*supra*), and properly, in so far as that was an action

based on negligence; but it is evident, nevertheless, that the decision of the Court of Appeal necessarily repudiates the main proposition on which the reasoning of the Privy Council rested. The proposition was that there can be no legal causal connection between a mental shock and the physical injuries which may ensue. It is submitted that the position taken by the court in the later case is the more satisfactory.

Theoretically there seems to be no good reason why physical injuries should not be compensated for, though they be caused by what affects primarily only the mind. Some wrongful or negligent act, determined to be such in the light, not of subsequent events, but of ordinary circumstances, must be shown in the party against whom recovery is sought. Having found such breach of the defendant's legal duty to the plaintiff, it will not be disputed that fright may follow under any and all rules by which the existence of legal cause is determined. Where there is nothing further, the plaintiff is denied recovery merely because an emotion of the mind, though painful and distressing, "cannot in itself be regarded as measurable temporal damage." Pollock on Torts, 4th ed., 46, 47; *Lynch v. Knight*, 9 H. L. 577. But when the mental pain is followed by physical suffering, there exists the sort of injury for which there is legal remedy, and the question becomes whether the causal connection is broken. A scientific determination of precisely what takes place is not necessary to the legal consideration of this question. If the mental shock is followed by physical suffering, and it be shown in fact that no outside influences have intervened, the causal connection is certainly not broken. The real difficulty is in the proof of the facts necessary to make out the plaintiff's case. It is suggested that a keen realization of this is what underlies the decision in the *Coultas* case and in similar cases. *Ewing v. Pittsburg, Cinn., and St. Louis Ry. Co.*, 147 Pa. St. 40. The evident probability that in such actions juries either will be deceived as to the facts, or through incomplete comprehension of a difficult subject will come to wrong conclusions, certainly warns the courts to be discreet in sanctioning such claims; whether it justifies them in refusing to consider the claims at all is indeed a grave question.

THE ENGLISH SOCIETY OF COMPARATIVE LEGISLATION.—In the November number of the REVIEW appeared an account of the French Society of Comparative Legislation, by M. Lévy-Ullmann. It is interesting to note that a similar society has at last been established in England. In December, 1894, the initial steps toward its formation were taken, and the recent appearance of its Journal shows that the work of the society is now well under way. Surely a work was never begun under brighter auspices. The president of the organization is Lord Herschell, and on the Council are such men as Sir William Anson, the Hon. T. F. Bayard, the Rt. Hon. James Bryce, Professor Dicey, Sir Edward Fry, Lord Halsbury, Professor Holland, Lord Justice Lindley, Professor Maitland, Sir Frederick Pollock, and Lord Russell of Killowen. With this backing, success is of course assured.

In the introduction to the Journal the purposes of the new Society are stated. "In the British Empire are some sixty legislatures; in the United States are nearly fifty. Each of them is occupied with much the same problems. . . . At present the results of foreign experiments are only imperfectly and casually brought to the notice of those who

might profit by them ; and enactments may be proposed and adopted in one English-speaking community in ignorance of the fact that similar measures have after trial been abandoned or modified in another." To prevent this by disseminating a more extended knowledge of the substance and form of legislation in other jurisdictions, will be one of the main objects of the Society. It will also undertake the scientific study and comparison of the diverse systems of law, Hindu and Mohammedan, French, Roman-Dutch, and Spanish, which come before the Privy Council in the exercise of its remarkable jurisdiction as Appellate Court for the Colonies.

Following the example of the American Bar Association and the *Institut de Droit International*, the Society has formed standing committees, intrusted with different departments of the work. These committees are to deal respectively with Statute law, Mercantile Law, Comparative and Historical Jurisprudence, and Procedure. The information collected by the Society is to be published in convenient form, probably to a great extent in its Journal, of which the first number is fairly indicative of the nature of the work undertaken. It contains two hundred and thirty-eight pages, and includes articles on The Legislation of the British Empire in 1895, Modes of Legislation in the British Colonies, The German Civil Code, Application of European Law to Natives of India and of Ceylon, and The State Legislation of America in 1895.

A STRANGE APPLICATION OF AN OLD DOCTRINE. — The New York Court of Appeals has recently been called upon to decide a novel question. A woman was pregnant by one A, who, on seeking for a way out of the difficulty, bethought himself that his friend B was looking about for a wife. At their next encounter A informed his friend that he knew of a virtuous young woman who might be willing to wed, and ultimately B was induced by false representations to marry the very woman whom A had seduced. He soon learned of the fraud that had been practised upon him, and instead of repudiating the union, as he might well have done, he sought revenge upon A through the instrumentality of the courts of justice. The result was the case of *Kujek v. Goldman*, the final decision of which, in the Court of Appeals, is reported in the New York Law Journal of October 21, 1896.

The court admitted that the action was unprecedented, but felt satisfied that the plaintiff, in being compelled to support a woman he would not otherwise have married, and in being deprived of her services while she was in child-bed, had suffered legal damage for which he could recover in an action of deceit. And upon this peg it was deemed permissible, owing to the nature of the case, to hang exemplary damages. Thus far the logic of the decision seems unassailable, though the particular point decided is new. The nearest approach to it appears to be found in those cases where a marriage is induced by fraudulent misrepresentations to one of the parties concerning the amount of property possessed by the other. This is regarded as an actionable wrong, and in certain cases courts of equity have compelled the person guilty of the fraud to make good his representations. *Montifiori v. Montifiori*, 1 W. Bl. 363 ; *Piper v. Hoard*, 107 N. Y. 73.

In the case under discussion, however, the court proceeds to assert a much more radical doctrine. It is laid down that "the action can

be maintained upon a broader and more satisfactory ground, and that is the loss of *consortium*, or the right of the husband to the conjugal fellowship and society of his wife." This is a rather surprising assertion, as the action for loss of *consortium* is generally supposed to be maintainable only against one who seduces or entices away a wife after marriage. The New York court, however, says that the gist of the action lies in the husband being deprived of a certain right, and whether he is deprived of it after acquiring it, or prevented from acquiring it, is immaterial. In other words, "when he entered into the marriage relation, he was entitled to the company of a virtuous woman, yet, through the fraud of the defendant, that right never came to him. . . . The injury, although effected by fraud before marriage, instead of by seduction after marriage, was the same, and why should not the remedy be the same?" This reasoning seems inconclusive. In the absence of the element of deceit, it is clear that the seducer of a woman is under no liability to the man she subsequently marries. Why should the presence of this element bring the case within the scope of the action for loss of *consortium*? The defendant in *Kujek v. Goldman* had certainly done the plaintiff a great wrong, but the action for deceit afforded the latter an ample remedy. One may well wonder why the court should have gone out of its way to enter such questionable territory.

LORD RUSSELL'S VALEDICTORY TO THE AMERICAN BAR ASSOCIATION.—At Saratoga last August, after Mr. Austen G. Fox had finished the reading of his paper on 'Two Years' Experience of the New York State Board of Law Examiners, which is printed in this number of the REVIEW, Lord Russell arose and made some rather extended remarks. After speaking of the enormous influence exerted by the Bar in all civilized countries, and of the high importance that all who enter the profession should be required to bring to its duties an adequate equipment, he turned to the topic of the American Bar Association, and American lawyers in general, and concluded as follows: "I would like before I sit down to be allowed to express the admiration I feel, not only for the constitution of this Congress of United States lawyers, but for the scheme of its operations, and the wise purposes to which it devotes its efforts. Its work is not new to me. I have had the pleasure of seeing now for some years the record of its proceedings, and it is to me, as it was on hearing the admirable presidential address which was delivered on Wednesday, in the highest degree refreshing to find that the members of the Bar in this country are so earnestly alive to the responsibilities of their position, are so keen to observe, to weigh, to judge, to discriminate, to test the current of judgment and of legislation, and that above all they keep before themselves steadfastly and unceasingly a high ideal of what ought to be, not merely the mental equipments and the acquirements in learning, but the high moral character of the profession to which they belong."

WHO SHOULD PAY COSTS?—To leave each party to a lawsuit to pay his own expenses, as is practically done in Massachusetts, seems an evident selling of justice. Justice, to be sure, is like any other commodity in that it costs to produce it; but when the cost of justice is more than the man who needs it can afford to pay, or more than it is worth to him

in his particular case, it is intolerable that he should be forced to go without it. In England they manage things better, on the whole, by making the unsuccessful party pay in general all the expenses of the litigation. The frequent hardships caused by the strict application of this rule, which punishes the unsuccessful party for his mistake in bringing or resisting the claim, with a severity usually in direct proportion to the doubtfulness of the matter in dispute, are well pointed out in an article in the *Law Quarterly Review* for October. The impracticability of a thorough application of the principle, and its real lack of fairness in many cases, causes it to be much relaxed in the actual practice of the English courts. But such a relaxation, except in cases where the successful party is morally at fault, is merely a return to the more primitive form of injustice. The only apparently effective way of removing the evils of present systems of imposing costs is to have the State pay them, and distribute justice gratuitously. However revolutionary such a step may seem, however great the practical difficulties of the change, it may be doubted whether the new evils that would arise would be as great as those we now endure. The people would have to pay heavier taxes; but it would be for a purpose at least as beneficial as many of those for which government funds are at present used; and as for the supposed increase of litigation that would be brought about by the cheapness of justice, there are, as the writer of the above article points out, two sides to the question. The man who brings suits knowing them to be unfounded can be restrained in more direct ways than by the fear of costs; while he who threatens to bring unjust suits, or refuses just demands, in a frequently well-founded reliance on his victim's reluctance to becoming involved in the risk and expense of a lawsuit, would have no chance under the new system.

FORMER ACQUITTAL UNDER A DEFECTIVE INDICTMENT.—The rule of English criminal law, that a prisoner who has been acquitted after trial on an insufficient indictment may be indicted again for the same offence, has hitherto been followed wherever the question has arisen. If there were any cases to the contrary, it may be assumed that they would be noticed in the learned opinion in the case of *Ball v. U. S.*, 163 U. S. 662, which decides that a general verdict of acquittal is a bar to a second indictment, though the first indictment was defective. The usually accepted doctrine is founded on *Vaux's Case*, 4 Coke, 44, a most venerable authority. Both Lord Coke and Lord Hale, however, considered that *Vaux's Case* was to be supported only on the ground that the judgment, which was after a special verdict, was in such a form as to leave it doubtful whether the acquittal was on the merits or for the fault in the indictment, and the presumption must be that it was for the latter cause. (See 3 Inst. 214; 2 Hale P. C. 248, 394.) Apart from the actual probability that the judgment in that case was really given upon the merits (see 1 Starkie Cr. Pl., 2d ed., 320), it seems unjust to give the benefit of the doubt to the prosecution; Lord Hale says, "The judgment in *Vaux's Case* was one of the hardest I ever met with in criminal causes." (2 P. C. 394.) In the common practice, both of that day and this, if a judgment or verdict of acquittal is for defect in the indictment that fact will appear on the face of the record.

With whatever degree of reason the rule as to acquittals on insufficient indictments may have been founded on *Vaux's Case*, it is now

widely accepted; and it is held not to conflict with the general principle made binding on our Federal Courts by the Constitution, that no man shall be twice put in jeopardy for the same offence. The contention is that the prisoner cannot be said to have ever been in jeopardy during his trial on an imperfect indictment, because there is always a presumption that the court will set aside the proceedings before judgment. Such a presumption, however, is not founded in fact; for the courts do not of their own motion scrutinize every indictment on which there has been a verdict of guilty, and refuse judgment for any formal defect. If the accused is to take advantage of these flaws, his counsel must point them out. As a matter of fact, very many prisoners have suffered punishment after conviction on indictments in which sufficiently acute counsel might have made the court recognize more than one technical flaw. The usual rule permits the prosecutor to put the accused so far in jeopardy that, if the jury goes against him, he is practically certain to be punished, unless he has exceptionally sharp-witted counsel, and then, after the jury has acquitted him on the merits, to come forward, and, by taking advantage of a flaw in the indictment that he has himself framed, subject the accused to a second trial. In this country, at any rate, a verdict of acquittal on a perfect indictment is held to be in itself a bar to subsequent prosecutions. If then the jeopardy of the prisoner is in fact equally great in most cases where the indictment is insufficient, the verdict ought to be equally a bar to another trial. And certainly it will encourage the careful conduct of the government's case, and lessen needless harassing of prisoners, if prosecutors are prevented from taking advantage of their own mistakes to begin proceedings all over again.

WHERE CAN INTANGIBLE PROPERTY BE TAXED?—There is much confusion in the authorities as to the extent of legislative power to tax intangible property where the State has not jurisdiction of the owner. This may be attributed in part to a frequent misuse of the fiction, *Mobilia personam sequuntur, immobilia situm*. Because of the number of States now taxing inheritances, three recent decisions of the New York Court of Appeals are important. It was held, that the legislature has power to impose such a tax on the stock of a domestic corporation owned by a non-resident decedent and bequeathed to a non-resident, the certificates being kept out of the State, but not on bonds of a domestic corporation similarly owned, etc. (*In re Bronson*, 44 N. E. Rep. 707); that the bonds of a foreign corporation owned and bequeathed in like manner can be similarly taxed when they are actually deposited within the State (*In re Whiting's Estate*, Ibid. 715); and that a non-resident decedent's deposit in a New York trust company is also subject to such taxation. (*In re Houdayer's Estate*, Ibid. 718.)

These cases are of general interest, more because of the instructive opinions delivered by Gray and Vann, JJ., than for the actual results under the New York statute. In their opinions in each of the cases these judges, who concur only in holding the stock in the *Bronson* case taxable, approach the subject from entirely different points of view. The position maintained by Gray, J., that intangible property "can have no locality separate" from its owner, is vigorously assailed by Vann, J.

The fiction *Mobilia personam sequuntur* is really an expression of a rule of law as to the administration of deceased person's estates. Story,

Conf. Laws, 6th ed., § 379. It has not been allowed to prevent the taxation of tangible property physically within the jurisdiction. *Hoyt v. Commissioners of Taxes*, 23 N. Y. 224, 228. The trouble is, as Vann, J. says (p. 711), that intangible property has ever been perplexing "because it has no physical presence. . . . It may exist, as it were, in the air. . . . Such rights are ordinarily regarded as attached to the person of the owner, but they are not inseparable from him, because creditors are permitted to seize them. . . . There is nothing, therefore, in the nature of the most intangible right . . . to prevent the legislature from giving it a *situs* apart from the residence of its owner," provided it has "some practical existence in the State that assumes jurisdiction." This seems the sound view. The analogy of jurisdiction in garnishment proceedings appears to be perfect. The answer (see the *Houdayer* case, 38 N. Y. Supp. 323, 325), that jurisdiction over the debtor is not jurisdiction over the debt, because the tax law creates the obligation which is enforced, while in attachment of a debt only an existing obligation is enforced, is not satisfactory, whether or not garnishment is viewed as a proceeding *in rem*.

On principle, there appears to be no real distinction between the power to tax the bonds in the *Bronson* case and the power to tax interest which a domestic corporation pays to its foreign bondholders. The Supreme Court was divided five to four in holding that Pennsylvania could not impose such a tax as impairing the obligation of contracts. *State Tax on Foreign-held Bonds*, 15 Wall. 300. Mr. Justice Vann's distinction between a tax on the right of succession and a tax on property does not seem to meet the question squarely, where the power to tax the right of succession depends upon jurisdiction over the thing inherited.

The *Whiting* case, *supra*, rests upon a different principle. In the *Foreign-held Bond* case (p. 324) it was said that state and municipal bonds, by usage, and a bank's circulating notes, because treated as money, are so far tangible property that they may be taxed where found. See *Dos Passos*, *Inh. Tax*, 2d ed., 65. With this principle once established, that the documentary evidence of intangible property may be treated as tangible property, it becomes a question of fact whether usage has gone far enough to justify its application. There may easily be a difference of opinion in a given case, and yet one would hardly say a decision either way was wrong. When this characteristic has become attached to any kind of intangible property, it is a question whether it can consistently be held that the character of intangible property remains so that the property can be reached through the debtor.

RECENT CASES.

BILLS AND NOTES — CERTIFICATION OF NOTE BY BANK — PAYMENT. — Defendant, holder of a note payable at the plaintiff bank, caused it to be presented for certification. A few days after certifying the note, plaintiff discovered that it did not possess funds of the maker sufficient to pay it, and requested that the note be withheld from the clearing house. The note was not withheld, however, and the clearing-house bank of the plaintiff was obliged by the rules of the clearing house to pay it, as an item against a bank for which it cleared. *Held*, that plaintiff could not recover the amount

as paid under a mistake of fact. *Riverside Bank v. First National Bank of Shenandoah* 74 Fed. Rep. 276.

The courts of Massachusetts and New York allow recovery in such cases, but the weight of authority is against it. See, for cases and full discussion, 4 HARVARD LAW REVIEW, 305. The principal case is undoubtedly right in leaving the loss where it fell without defendant's fault, and in clearly recognizing the fact that certification is as final as the payment of money. The one cannot be rescinded and the other cannot be recovered.

BILLS AND NOTES — FORGED INDORSEMENT. — The plaintiff deposited a check for collection with the defendant bank. The check was paid by the bank on which it was drawn, but it afterwards turned out that a prior indorsement had been forged, without the plaintiff's knowledge, and the defendant refunded the amount to the drawee. *Held*, the defendant could apply any fund of the plaintiff afterwards coming into its possession to reimburse itself, although at the time of refunding the money it had not notified the plaintiff of the forgery. *Green v. Purcell Bank*, 37 S. W. Rep. 50. (Ind. Ter.)

The case is important as involving the point that money paid on a check containing a forged indorsement can be recovered back by the drawee, for unless there was such legal right of recovery the defendant would not have been entitled to charge the plaintiff, who indorsed to it. That this is the correct view seems evident (see 4 HARVARD LAW REVIEW, 297, 307), but the Queen's Bench Division has recently reached a directly opposite conclusion. *London Bank v. Bank of Liverpool*, [1896] 1 Q. B. 7. See 9 HARVARD LAW REVIEW, 480.

BILLS AND NOTES — NEGOTIABILITY — CERTAINTY AS A REQUISITE. — A mortgage contained a provision that if the mortgagor should leave any taxes unpaid for thirty days, such taxes, and the principal and interest of the note accompanying the mortgage, should at once become payable. *Held*, that the note was non-negotiable on account of uncertainty in the amount payable on it. *Brooke v. Struthers*, 68 N. W. Rep. 272 (Mich.). See NOTES.

CARRIERS — NEGLIGENT DELAY — LIABILITY FOR CONSEQUENTIAL DAMAGE. — *Held*, that a carrier is not liable for special damage resulting from delay, caused by negligence after notice, provided he did not know that it might result when he made the contract. *Bradley v. Chicago Ry. Co.*, 68 N. W. Rep. 410 (Wis.).

The obligation to carry does not rest on contract, though the decision in the principal case might give one that impression. The carrier is bound to transport goods though he expressly refuses to take them. On the other hand he owes a duty to shippers only, not to all the world. A breach of it therefore is not a tort. The courts recognize this, and that there is no action specially fitted to enforce the carrier's obligation, by allowing suit in either assumpsit or case. In the principal case there was a breach of the duty to carry with reasonable speed, and when the carrier learns of additional cause for haste he should use corresponding care. If he negligently delays he violates his common law duty. The rule of damages in torts is therefore more appropriate than the rule in contracts. Cases in England and *dicta* in this country support the principal case, but the recent decisions in England are tending the other way. See 9 HARVARD LAW REVIEW, 215.

CONFLICT OF LAWS — GENERAL AND PARTICULAR DOMICIL. — A, having a domicile in Tennessee, went to Texas, which he proposed to make his home. He had in mind, however, no definite place as a local residence, but intended to live from time to time in different parts of the State. *Held*, that he immediately acquired a domicile in Texas. *Marks v. Marks*, 75 Fed. Rep. 321.

The case is interesting as deciding that a person may have a general State domicile, without being domiciled at any particular place in the State. This doctrine has sometimes been denied; Lord Fullerton's opinion in *Arnott v. Groom*, 19 Sc. Jur. 43, 45. But on principle the status of *general* domicile would seem entirely permissible under circumstances like those in the leading case. For the two requisites of domicile, the *factum* and the *animus*, the actual living and the intention to remain, are both present. Moreover, an argument in favor of this view is, that the only alternative is to invoke the "constructive" theory, and by a fiction set up a past domicile. Now domicile should be based, as far as possible, on facts rather than on legal fictions. The latter should be resorted to only in a case of necessity. And it is much more in accord with the real facts to regard a man's home as in that place where he is and expects to stay permanently, than as in some State in which he formerly resided, but with which he now has absolutely no connection. *In re Craignish*, [1892] 3 Ch. 180, 192.

The case may become a leading one, as the exact question which it raises seems never to have been decided before, at least in the United States. The current of opinion

of the best text writers, both in this country and in England, agrees with the results reached by the court. Jacob's Law of Domicil, § 133; Dicey's Conflict of Laws, 91-93.

CONSTITUTIONAL LAW—IMPAIRMENT OF OBLIGATION OF CONTRACTS.—A Rhode Island statute authorized any town to construct waterworks for the use of the town, and also contract with third parties for a water supply. The town of Westerly granted this right of constructing waterworks and supplying the town with water to the plaintiff, a corporation organized for such purpose. After the plaintiff had complied with all the requirements of the grant, the town passed a vote for the construction by itself of a waterworks plant. The plaintiff filed a bill to restrain the town from carrying out its vote. *Held*, that this action of the town, being taken under a State statute, was in effect action by the State. As such it was opposed to the provisions of the constitution of the United States, being a law impairing the obligation of the previous contract with the plaintiff. Plaintiff was consequently entitled to his injunction. *Westerly Waterworks v. Town of Westerly*, 75 Fed. Rep. 181.

This decision seems questionable, to say the least. The only positive act of the State legislature in reference to the question was passed previously to the town's contract with the plaintiff. For a State law to impair the obligation of a contract, it must be passed subsequently to the formation of such contract. (*Lehigh Water Co. v. Easton*, 121 U. S. 388.) And it is hard to see how a vote of a town under authority of a State statute can be considered a law of the State. It may be that the town is liable to the plaintiff for breach of contract; that would depend on the terms of the contract; but that is a very different matter from saying that a vote of a town can be a State law under the provisions of the Federal Constitution.

CORPORATIONS—BUILDING AND LOAN ASSOCIATIONS—USURY.—Under the usual statute allowing building and loan associations to make loans to members, it was provided that premiums paid for right of precedence in taking loans, although in excess of legal interest, should not be considered as making the loan usurious. *Held*, that the interest might be reserved at the highest rate permitted by law on the face of the note, although the premium was deducted from that amount and the difference only paid to the borrower. *Association v. Drummond*, 68 N. W. Rep. 375 (Neb.).

Looked at as a loan for the face of the note, out of which the borrower immediately pays the premium, there can be no logical objection to this decision, as in this case interest on the face of the note is merely interest on the actual loan. *Association v. Webster*, 25 Barb. 263. Or it may be considered a loan for the face of a note which is made up of two sums: first, an amount equal to the difference between the face of the note and the premium; secondly, an amount equal to the premium, which it is not necessary for the borrower to turn over to the association, as it would be immediately paid back to him. *Bowen v. Association*, 28 Atl. Rep. 67 (N. J.). But see, *contra* to the principal case, *Association v. Gallagher*, 25 Ohio St. 208, and *Association v. Blackburn*, 48 Iowa, 385, which seem to go on the ground that exceptions to usury laws accorded to building and loan associations should be strictly construed,—that the interest should be computed on the money actually loaned, and not on the sum bid for.

CORPORATIONS—REORGANIZATION—LIABILITY OF OLD CORPORATION FOR DEBTS OF NEW.—A mining corporation being in debt, its stockholders organized another company, which leased the property of the first and paid off all its existing debts. The same men controlled both companies at all times. *Held*, a mechanic's lien for work and materials furnished the new company could be enforced against the old company, the lessor of the premises. *Hatcher v. United Leasing Co.*, 75 Fed. Rep. 368.

The case proceeds on the ground that as to all outside parties there is no change of title, and the old company cannot escape from any liability by its fictitious lease to itself under another name. The case usually arises on an attempt to hold the new corporation for the liabilities of the old one, and the question then is, whether the new company is a revival of the old or a new and distinct creation, for in the latter case no liability attaches to the new company. In such cases the test is the legislative intent in conferring the new charter. 1 Thomp. Corp. § 256. But in the principal case there would seem to be no doubt as to the separate character of the two measured by this test,—the new one being chartered to lease the property of the old is a clear legislative recognition of their individuality. Though the grounds of the decisions seem at least doubtful, the case may well be supported as one of those where, by reason of the interest the lessor has in the improvements, the reversion is subject to the mechanic's lien. *Burkitt v. Harper*, 21 N. Y. Sup. Ct. 581; *Moore v. Jackson*, 49 Cal. 109.

CORPORATIONS—RIGHT TO PREFER CREDITORS.—*Held*, that when a corporation has ceased to carry on business and is insolvent, the directors have no right to pay some creditors in preference to others. *Allison v. The Bradt Printing Co.*, 37 S. W. Rep. 10 (Tenn.).

The weight of authority is perhaps opposed to the principal case, holding that a corporation is an artificial person, and like a person, should be able to prefer its creditors. *Morowetz on Corp.*, § 802. In reply to this it is said, that the directors can only dispose of the company's funds as prescribed in the charter. When business ceases to be carried on, and the company is insolvent, it is an implied condition that the money shall be held as a fund for the benefit of creditors and stockholders. Unless it is absolutely necessary it is surely unwise to extend further the doctrine of preference, of doubtful advantage as exercised by individuals. If it is extended it would seem logically that directors might be able to prefer themselves.

CORPORATIONS — SUSPENSION OF MEMBERS. — Relator was a member of a voluntary incorporated organization owning property, its charter giving it a right of expulsion of members as might be directed in its by-laws. Having been charged and convicted by the board of directors, according to its by-laws, of an offence punishable by expulsion or suspension, relator attempted to compel his reinstatement by mandamus. *Held*, that under such circumstances the determination of the board of directors could not be reviewed. *Board of Trade v. Nelson*, 44 N. E. Rep. 743 (Ill.).

The decision is undoubtedly correct. The relator should be held bound by the judgment of a tribunal authorized by the charter of the corporation to which he has voluntarily submitted himself upon becoming a member of the corporation, when that tribunal acts in good faith and after notice and opportunity for full hearing. *Com. v. Pike Benev. Soc.*, 8 W. & S. 247. It is probable that this decision, together with that in *Pitcher v. Board of Trade*, 121 Ill. 412, holding that chancery will not interfere in such cases, will put an end to a vast amount of litigation in the courts of common law and of equity in Illinois, attempting to subject the power of expulsion by such corporations, regularly exercised, to the revision of the courts.

CRIMINAL LAW — EVIDENCE. — *Held*, that on a trial for murder, evidence of the violent and dangerous character of the deceased might be introduced by defendant to prove self-defence and to show that defendant acted under such circumstances as would cause a reasonable man to believe himself in imminent danger, but that it was admissible only where it gave significance to the conduct of deceased at the time of the killing; and defendant must first show such conduct by deceased as, though innocent if considered independently of the violent character of deceased, yet when considered in connection with such character, would arouse a reasonable belief of imminent peril; that defendant might lay the basis for the introduction of such testimony as to character by his own evidence as to the conduct of deceased. *Hart v. State*, 20 So. Rep. 805 (Fla.).

The decision represents the weight of authority upon this exception to the general rule that it is inadmissible for the defendant to put the character of deceased in issue. The admission of such evidence, after a foundation for it has been laid by the preliminary proof demanded, appears proper as showing the belief of defendant as to the probability of attack, and its character. *Hurd v. People*, 25 Mich. 405. Massachusetts, however, refuses to admit such evidence. *Hilliard v. Com.*, 2 Gray, 294. It may be questioned if the last decision would stand should the point again be raised, as a former decision upon an allied matter, viz., a refusal to allow the introduction of proof of the extraordinary muscular development of deceased, in *Com. v. Mead*, 12 Gray, 167, was overruled in *Com. v. Barnacle*, 134 Mass. 215.

CRIMINAL LAW — FORMER ACQUITTAL. — *Held*, that a general verdict of acquittal after plea of not guilty to an indictment charging murder, not objected to before verdict, is a bar to a second indictment for the same offence. *Ball v. U. S.*, 163 U. S. 622; 16 Sup. Ct. Rep. 1192. See NOTES.

DEEDS — ACKNOWLEDGMENT BEFORE INTERESTED OFFICER. — Plaintiffs, husband and wife, executed a trust deed of land in favor of defendant corporation, as security for a loan. Bill to enjoin foreclosure on the ground that the acknowledgment, which was before a notary, who was also a director in defendant corporation, was void. Injunction refused. *Held*, that such an acknowledgment, while open to grave suspicion of fraud or undue influence, is not void *per se*. *Cooper v. Hamilton Loan Association*, 37 S. W. Rep. 12 (Tenn.).

Taking a married woman's acknowledgment of her deed is commonly considered a judicial, not a ministerial, act. Such acknowledgments before an interested party are therefore in most States held void. In Tennessee, however, even a judgment rendered by a related or interested party is not void (*Holmes v. Eason*, 8 Lea, 754), and the same rule is naturally followed in regard to acknowledgments. While this may perhaps sufficiently protect the married woman from fraud and undue influence, it must be admitted that such acts on the part of an interested officer are to be deprecated, and can be checked most effectively by treating them strictly as void.

EQUITY—JURISDICTION IN CASE OF MENTAL DISABILITY.—*Held*, that equity will entertain a suit by the next friend of a person of weak mind, incapacitated by age or infirmity, though not in such condition as to be adjudged a lunatic by the special tribunal provided for such purpose, to set aside conveyances obtained from such person by the undue influence and fraud of others, although the nominal plaintiff denies the incapacity and repudiates the acts of those bringing the suit. *Edwards v. Edwards*, 36 S. W. Rep. 1080 (Tex.).

The jurisdiction of equity to protect the property of persons of weak mind, who have not been found to be *non compos mentis*, is well established. *Light v. Light*, 25 Beav. 248. The chancellor will reinstate a bill by next friend, to set aside a conveyance obtained by fraud from one of weak mind, although the grantor has caused the bill originally filed for that purpose by him to be dismissed. *Owings Case*, 1 Bland Ch. 370. The principal case seems to have carried this wholesome doctrine of equity to its fullest extent by applying it to a case where there has been a distant adjudication against the mental unsoundness of the grantor.

INSOLVENCY—NATIONAL BANKS—EFFECT OF COLLATERAL HELD BY CREDITORS.—A creditor of an insolvent national bank, whose claim was secured by collateral, made proof against the bank to the full amount of his claim. *Held*, that subsequent collections made by the creditor on his collateral need not be deducted from the amount of his claim previously proved against the bank. *Merrill v. First National Bank of Jacksonville*, 75 Fed. Rep. 148.

Except where the matter is regulated by bankruptcy statutes, this case represents the general law. The court follow the case of *Chemical National Bank v. Armstrong*, 59 Fed. Rep. 372, where it was held that it made no difference whether collection on the collateral took place before or after proof of the claim. Although there is a conflict of authority on collections made before proof, the result seems correct. See 8 HARVARD LAW REVIEW, 61, and *Allen v. Danielson*, 15 R. I. 480. There seems to be an analogy between the principal case, and cases like *In re Souther*, 2 Lowell, 320, and *Ex parte de Tastet*, 1 Rose, 10, where it is held that full proof may be made against a party primarily liable on a bill or note, although there has been part payment by one secondarily liable. In the last cases the security is personal, while in the principal case the security is real.

INSURANCE—CHANGE OF OWNERSHIP.—*Held*, that the purchase of the fee by a mortgagee is not such an alienation as will invalidate an insurance policy taken out by the mortgagor for the benefit of the mortgagee with condition against "change of ownership." *Dodge v. Hamburg-Bremen Fire Ins. Co.*, 46 Pac. Rep. 25 (Kan.).

In general a mortgage is not considered an alienation within the meaning of such conditions. May on Ins., § 269. It is evidently considered that the question whether the mortgagor or the mortgagee has the title is immaterial in applying the condition. But when the mortgagee takes possession, or acquires full ownership under foreclosure, it is generally thought that an alienation is effected. *Macomber v. Cambridge Ins. Co.*, 8 Cush. 133. This seems the correct view. In *Bragg v. Ins. Co.*, 25 N. H. 289, where the mortgagor insured for the benefit of the mortgagees, as here, it was held that as the interest remained with the party liable for the premiums, a foreclosure was not an alienation; but that decision seems as unsatisfactory as that in the principal case.

INSURANCE—INTERPRETATION OF CONDITIONS.—A fidelity insurance policy required that particulars of loss be furnished within three months, and that any action be brought within twelve months from discovery of loss. A defalcation was discovered while the assured, a national bank, was in the hands of a receiver, and the accounts were being taken by the comptroller. When the bank was restored, the time of limitation under the policy had elapsed. *Held*, that the omission of the receiver to sue would not be imputed to the bank; and that the failure to perform the condition, having been caused by the receivership and resulting from the very event insured against, would not prevent recovery. *Jackson v. Fidelity Co.*, 75 Fed. Rep. 359.

Throughout the receivership, the corporate entity existed as before (High on Receivers, 3d ed., § 358); so whoever may have been the officer to sue, an action was possible from the discovery of the defalcation. And as full particulars mean only the best under the circumstances (Porter on Ins., 2d ed., 191), both conditions could have been complied with notwithstanding the receivership. If, however, full particulars were necessary, and to obtain them within the time became impossible, while it has been held that an express time must give way to a reasonable time (May, Ins., 2d ed., § 217; *Tripp v. Society*, 140 N. Y. 23), it must be remembered that the contract was made by the parties and not by the court, and recovery was contemplated for such damage alone as might not be excluded by the conditions. *Routledge v. Burwell*, 1 H. Bl. 254; *Johnson v. Ins. Co.*, 112 Mass. 49.

JUDGMENT—OPENING DEFAULT—NEGLECT OF ATTORNEY.—*Held*, that a default occasioned by the negligence and incompetence of the defendant's attorney may be opened. *Gideon v. Dwyer*, 40 N. Y. Supp. 1053.

In most American jurisdictions the courts, exercising, at common law or by statute, a discretionary power over their own judgments, have refused to set aside a judgment on the sole ground of the neglect, carelessness, or mistake of the attorney, the act or omission of the attorney being regarded, on principles of agency, as the act or omission of the client. Black on Judgments, § 341. In a few States, however, and among them New York and North Carolina, the negligence of the attorney is held to be a sufficient reason for setting aside a judgment, provided the client himself was not directly at fault. See *Gwathney v. Savage*, 101 N. C. 103; *Elston v. Schilling*, 7 Rob. (N. Y.) 74; *Meacham v. Dudley*, 6 Wend. 514. Justice certainly requires relief in some cases of default permitted through the negligence and incompetence of an attorney, but the New York courts seem to be somewhat too lenient. The principles they apply in this matter are indistinctly stated in *Levy v. Joyce*, 1 Bosw. 622.

JURISDICTION—ACTION FOR INJURY TO LAND.—*Held*, that an action will lie in one State to recover damages for injuries to land situated in another State. *Little v. Chicago, St. P., M. & O. R. R. Co.*, 67 N. W. Rep. 846 (Minn.).

The court in the above case acknowledges that their decision is opposed to overwhelming authority, both in the United States and in England, but they assert that such an action is in its nature transitory rather than local, and that the rule sustained by the authorities is "purely technical, and in practice often results in a total denial of justice." The House of Lords in a late case, *British South Africa Co. v. Companhia de Moçambique*, [1893] App. Cas. 602, reached a different conclusion from that of the Minnesota court. It was there held, overruling the previous decision of the Court of Appeal in [1892] 2 Q. B. 358, that an action of trespass to land situated in a foreign country could not be maintained. The decision was rested on the ground, that as such an action might involve an inquiry into titles to land in foreign countries, no courts but those of such foreign country had jurisdiction. This result seems correct in principle, and certainly shows an almost universally accepted rule of law. *Livingston v. Jefferson*, 1 Brock. 203. *Allin v. Lumber Co.*, 150 Mass. 560.

PARTNERSHIP—ENTITY THEORY.—Petition to set aside a sale made by a partnership which owed the petitioner money, on the ground that some of the creditors were thereby preferred. *Held*, "that a partnership is a distinct entity, having its own property, debts, and credits; and, for the purposes for which it is organized, it is a person, and as such is recognized by the law." Consequently it has a right to prefer its creditors. *Campbell v. Farmers' Bank*, 68 N. W. Rep. 344 (Neb.).

The sentence quoted from the opinion has become a catch phrase in the Nebraska courts, the judges making it the basis of their decisions. See *Roop v. Herron*, 15 Neb. 73; *Deitrich v. Hutchinson*, 20 Neb. 52; *Richards v. Laveille*, 44 Neb. 38. Such reasoning will accomplish what the legislatures and courts of equity have been attempting for more than a century to effect, viz., the adaptation of law to the custom of merchants. It will be held that the firm owns the capital and may be sued by any partner, while the death of a partner will not necessitate a dissolution. The books will show whether property belongs to the firm, or is rented to it by a partner, and the firm creditors will have as large a share as a personal creditor of the assets of a partner. The courts are slowly recognizing the principle involved in this case. See *Parsons on Partnership*, 4th ed., §§ 4 and 5.

PARTNERSHIP—PARTNER'S INTEREST IN FIRM PROPERTY.—One of the members of a firm made an assignment for the benefit of creditors; his assignee sold the assigning partner's interest in the firm. Subsequently the old firm effected insurance on a building which had been partnership property. *Held*, notwithstanding the previous assignment of the interest of one of the partners, the old firm remained the sole and unconditional owners of the firm property. *Wood v. Insurance Co.*, 44 N. E. Rep. 80 (N. Y.).

The decision follows logically from the mercantile conception of a partnership. "The property or effects of a partnership belong to the firm and not to the partners." *Bank v. Carrollton R. R.*, 11 Wall. 624. The partner's individual interest is an interest in the firm, not an interest in the firm's property. "One coming into the right of a partner comes into nothing more than interest in the partnership." *Taylor v. Fields*, 4 Ves. Jun. 396. Hence, in the principal case the transferee of the assigning partner did not become a part owner of the firm property.

PERSONS—HUSBAND AND WIFE—RIGHTS OF HUSBAND'S CREDITORS.—An insolvent debtor employed himself as an inventor. The patents which he obtained, he assigned to his wife for the benefit of a business which she carried on in her own name. A judgment creditor of the husband filed a bill to have such of the wife's property as

was engaged in this business subjected to payment of her husband's debts. *Held*, a husband in rendering to his wife in her business more help than he would ordinarily give her as head of the family, makes such business his own as regards his creditors. *Talcott v. Arnold*, 35 Atl. Rep. 532 (N. J.).

If actual fraud was found in the present case, such as to make the wife's business in reality that of the husband, the result reached is undoubtedly correct. On the other hand, it seems to be a sound rule of law, that, as the earning power and labor of an insolvent are not assets to his creditors, he may, if he does so *bona fide*, work in his wife's employ without subjecting her business to his creditor's claims. *Abbey v. Deyo*, 44 N. Y. 344; *Mayers v. Kaiser*, 85 Wis. 382. Though some of the court's language seems opposed to this last proposition, the case, on its facts, seems to have been rightly decided. The husband here did something more than work for his wife. By his labor he obtained certain property, namely, the patents. By the transfer of that property to his wife for the benefit of her business, he gave his creditors the right to subject such property of the wife's as was the result of the patents to the payment of their claims.

PROPERTY—ADVERSE POSSESSION.—The defendant had had possession of land for ten years, but other parties had entered and cut hay, their entries not being sufficient to break the continuity of the defendant's possession. *Held*, that the possession must be adverse to the whole world, not merely to the plaintiff who sues for the land. *Bracken v. Union Pacific R. R. Co.*, 75 Fed. Rep. 347.

The language of the court is ambiguous, and it is difficult to discover its meaning. As no question of successive disseisin is raised, the most plausible interpretation is that, in order to bar the true owner's right, the defendant must not have allowed parties to enter on the land during his occupancy. But if defendant's possession was continuous, and the jury did not find that the entries of the third parties were interruptions of it, then such entries were trespasses for which the defendant, being in possession, might have recovered damages. They did not amount to new disseisins. The facts of the case show that the plaintiff was out of possession for more than ten years (the statutory period in Nebraska), and that the defendant had continuous open adverse possession for that time. That the court should require his possession to have been also exclusive appears to be erroneous.

PROPERTY—QUITCLAIM DEED—PURCHASER FOR VALUE.—*Held*, that the holder of a quitclaim deed, properly recorded, who purchased in good faith and without notice of a prior unrecorded conveyance, takes title in preference to the grantee under such unrecorded conveyance. *Scholt v. Dosh*, 68 N. W. Rep. 346 (Neb.).

This case is interesting as showing what appears to be a tendency to drift away from earlier cases which hold that a quitclaim deed conclusively charges the grantee with notice of outstanding equities, including prior unrecorded conveyances. *Steele v. Sioux Valley Bank*, 79 Iowa, 339. The cases are hopelessly in conflict on this point, but the principal case represents the better view. It is to be noted that most of the authority *contra* to the principal case is very largely based on *dicta* in the United States Supreme Court cases, notably *May v. Le Clare*, 11 Wall. 217, which have been discredited by the more recent case of *Moelle v. Sherwood*, 148 U. S. 21.

SALES—BONA FIDE MORTGAGEE OF PURCHASER.—A purchased a chattel, giving in payment his note, indorsed by B as surety. It was agreed that property in the chattel should be in B until A paid the note. A, being in possession, purchased goods of C and agreed to give C a mortgage on the chattel in question as security. After delivery of the goods, but before the execution of the mortgage, C learned of the agreement between A and B. *Held*, that C could foreclose, and that his claim to the proceeds of sale should be prior to B's, though B had been compelled to pay the note given by A. *Wood v. Evans*, 25 S. E. Rep. 559 (Ga.).

If A had the legal title which the court seems to assume, the result reached is questionable. By the great weight of authority, C, having notice before the execution of the mortgage, should not have been regarded as a *bona fide* mortgagee. The view *contra* to the principal case was applied to a sale by a trustee as early as 1692. *Saunders v. Dehen*, 2 Vern. 271. So, a purchaser who receives notice of an equity before the indorsement of a bill is made to him, but after delivery and payment, is not a *bona fide* purchaser. *Lancaster Bank v. Taylor*, 100 Mass. 18; *Goshen Bank v. Bingham*, 118 N. Y. 349. The principal case, however, does not stand alone in this point. *Youst v. Martin*, 3 S. & R. 423.

If, however, B acquired the legal title, C's priority may have been properly upheld by the court, on their construction of a Georgia statute, requiring B to record his claim.

TAXATION—SITUS OF INTANGIBLE PROPERTY.—In three cases arising under an inheritance tax law, the New York Court of Appeals *held*, that the legislature has

power to impose such a tax on the stock, but not on the bonds, of a domestic corporation owned by a non-resident decedent and bequeathed to a non-resident, the certificates being kept out of the State, *In re Bronson*, 44 N. E. Rep. 707; to impose such a tax on the bonds of a foreign corporation, owned and bequeathed in like manner, when the bonds are actually on deposit within the State, *In re Whiting's Estate*, ib. 715; to impose such a tax on a non resident's deposit in a New York trust company, *In re Hondayer's Estate*, ib. 718. See NOTES.

TORTS—ASSAULT—REASONABLE FEAR.—Defendant fired a revolver near the plaintiff but not at him, intending merely to frighten him, not to do bodily harm, so that plaintiff was frightened, became sick, and suffered physically. *Held*, that defendant was not liable. *Degenhardt v. Heller*, 68 N. W. Rep. 411 (Wis.).

The court here proceed upon the ground that an intent merely to frighten is not a sufficient wrong on the part of the defendant to make him liable, and for support a number of definitions are cited to the effect that an intent to inflict bodily harm is a necessary element of assault. But this view seems opposed to the better opinion. It is well recognized law that the pointing of a pistol by one who knows it to be unloaded with intent only to frighten is enough to make the defendant liable. In *Com. v. White*, 110 Mass. 407, it was held that the ruling was properly refused that defendant must have had the intent to inflict bodily harm. On this point the decision in the principal case seems wrong, and the only ground on which it might be supported is that the plaintiff's injury was not such as the law would notice, namely, that he was not put in fear of bodily harm, but was frightened merely by the noise of the explosion. "The essence of the wrong is putting the man in present fear of violence." Pollock on Torts, 4th ed. 198.

TORTS—CONTRACT WITH THIRD PARTY—LIABILITY FOR RESULTING DAMAGE.—Under an agreement with the defendant, a railroad company constructed a switch to defendant's mills along a street in front of plaintiff's house. *Held*, that defendant was liable for injury done to property owners. *Patton v. Olympia Door & Lumber Co.*, 46. Pac. Rep. 237 (Wash.).

The defence in this case was, that it was not the defendant who constructed and ran the switch, but the railroad company. But the court answered this objection by saying that the railroad company ran the cars under an agreement with the defendant to do so and for his benefit. How far this principle of liability might be extended is a question of some interest, but there seems to be little doubt that the court was correct in going as far as it did.

TORTS—NEGLIGENCE—LEGAL CAUSE.—Defendant railway negligently blocked the street with a freight train. Plaintiff in trying to pass around the engine, tripped while still in the street, and fell, breaking her wrist. *Held*, that defendant's negligence was not the legal cause of the injury, since the fall was "neither the natural nor the usual result to be expected." *Enochs v. Pittsburg Ry. Co.*, 44 N. E. Rep. 658 (Ind.).

Defendant, a gas company, knowingly allowed its mains to fall out of repair, so that gas escaped through the earth into a basement and exploded, killing plaintiff's intestate. *Held*, that defendant's negligence was the legal cause of the explosion, which was "one of the natural results," one "which the defendant was bound to anticipate." *Alexandria Co. v. Irish*, 44 N. E. Rep. 680 (Ind.).

These cases are clearly right. It is to be observed, however, that between them lies the class of cases where the result, while following in the course of nature, is not such as any one would consider probable. On such cases the Indiana court may some time find it necessary to draw a sharper line of distinction.

TORTS—PHYSICAL SUFFERING RESULTING FROM MENTAL SHOCK.—Plaintiff, through mental excitement and fright, became incapacitated for work. *Held*, he could recover under the terms of a policy insuring him absolutely for all accidents, however caused, occurring in the fair and ordinary discharge of his duty. *Pugh v. London, Brighton and South Coast Railway Co.*, [1896] 2 Q. B. 248. See NOTES.

TRUSTS—RIGHT TO CONTRIBUTION AS BETWEEN CO-TRUSTEES—STATUTE OF LIMITATIONS.—The plaintiff, who was trustee of a marriage settlement, allowed the trust fund to be in the hands of his co-trustee, the defendant, for investment. The defendant intrusted the whole fund to an "outside" stockbroker, who applied a portion of it to his own use. In an action by the plaintiff and the infant *cestuis*, defendant claimed contribution against the plaintiff trustee. The stockbroker was employed by defendant in 1885. *Held*, that the right to contribution creates a debt, but that such right does not come into existence until the *cestui* has obtained judgment against the trustee so claiming contribution. Consequently, defendant's claim

arose upon the date of this judgment and not before. *Robinson v. Harkin*, [1896] 2 Ch. 415.

The court simply applies to a suit between co-trustees the principle which is recognized in suits between co-sureties. *Wolmershausen v. Gullich*, [1893] 2 Ch. 514. But the decision is important, for there is little or no authority on the point in this country. There appears to be no reason to doubt the soundness of the decision.

REVIEWS.

STUDIES IN THE CIVIL LAW AND ITS RELATIONS TO THE LAW OF ENGLAND AND AMERICA. By William Wirt Howe, of the Bar of New Orleans: Sometime a Justice of the Supreme Court of Louisiana, and W. L. Storrs, Professor of Municipal Law in Yale University for the Year 1894. Boston: Little, Brown, & Co. 1896. pp. xv, 340.

This book is the outcome of a Course of Lectures delivered before the Law School of Yale University by one of the most eminent of Louisiana lawyers.

The plan of the work is excellent. What has been written in English of late years on the Roman Law is largely of that Law as a dead thing; it has been studied as the Latin grammar is studied; indeed, it seems as if it were the archaic forms revealed to us by Gaius, which have especially attracted writers and students. To have the Roman Law as the vivifying principle of great legal systems of to-day discussed in the English language by a practising civilian, is to have made an important addition to our legal literature. But the gain is doubled by the fact that Judge Howe is not only a civilian, but a common law lawyer, and has thus been able to give us many interesting and fruitful comparisons between the Roman and Civil Law, and, what is of even more moment, has known how to approach the problems of the latter Law through the medium of actual decisions in the way that is entitled to gain them the most attention and respect from those of us who have been bred in the methods of the Common Law.

The book shows the marks of its original form of lectures. It is very clear and pleasant reading, with something of the liveliness of a spoken discourse; on the other hand, if it had been conceived originally as a printed book, the order of thought would probably have been closer, and the general prospective better preserved. Doubtless no one knows this better than Judge Howe, and we trust the success of these Studies, as he modestly names them, may justify a new edition, in which there shall be some omissions in the beginning and ending chapters, and some additions in the body of the work.

J. C. G.

JURISDICTION, PRACTICE, AND PECULIAR JURISPRUDENCE OF THE COURTS OF THE UNITED STATES. By Benjamin Robbins Curtis, LL. D. Second Edition, Revised and Enlarged by Henry Childs Merwin. Boston: Little, Brown, & Co. 1896. pp. xxvi, 341.

If this little volume had nothing else to recommend it, its convenient size and neat binding would bring it readers. It is a pleasure to find a law book in so convenient a form.

Judge Curtis delivered a course of lectures on the jurisdiction of the Federal Courts at the Harvard Law School in the academic year 1872-73. The lectures, which were wholly oral and extemporaneous, were taken down by a shorthand writer and published in 1880. The present volume is a second edition of that publication. Owing to many changes which have recently been wrought by legislation, a small part of the original edition is omitted and several new paragraphs and chapters are added. The additions, however, are all enclosed in brackets, and the work of Judge Curtis is thus left practically intact and easily distinguishable.

Of the high merit of the book there can be no question. The lecturer was qualified to deal with the subject as few could be, and he brought to bear on the work all the resources of a singularly keen and well-stored mind. The result is apparent in his clear and interesting treatment of the most technical branches of his subject. The only fault noticed in the work, if fault it be, is due to the fact that it is, as it were, a spoken and not a written book. The style tends toward the conversational, and there is occasional repetition.

R. G. D.

A SELECTION OF CASES ON THE LAW OF CARRIERS OF GOODS AND PASSENGERS. By Emlin McClain, LL.D., Chancellor of the Law Department of the State University of Iowa. Second Edition. Boston: Little, Brown, & Co. 1896. pp. xi, 744.

The second edition of Chancellor McClain's Cases on Carriers is a great improvement over the first. Many cases have been added to the collection, but the book has nevertheless been made more compact by the omission of certain unnecessary portions of the cases. (See *Orange County Bank v. Brown*, 1st ed., p. 26, 2d ed., p. 34.) While it is of undoubted benefit to the student to take the original report and sift out the essence of a case, experience has shown that in a case book the shears must be freely used in order to save the student's time, and so cover as much ground as is consistent with thoroughness. A further improvement is noticed in the better arrangement of cases under headings, printed in the body of the book. By the addition of new material various subjects have been more fully developed. The printing of *Munn v. Illinois*, 94 U. S. 113, as the first case in the book, is an excellent idea, as it is absolutely essential that the student at the very outset should be given an idea of a "public calling," early a very important conception in the law. It is to be regretted that the famous case of *Coggs v. Bernard*, 2 Ld. Raym. 909, has not been given a place in the new edition. E. S.

ELEMENTS OF THE LAW OF CONTRACTS. By Edward Avery Harriman. Boston: Little, Brown, & Co. 1896. pp. xli, 342.

This is a wonderfully comprehensive little book. The author says of it that it is "an attempt to explain the rules of positive contract law which are to-day enforced by the courts of England and the United States, in accordance with the actual historical development of those rules, and to classify and arrange those rules as far as possible in a scientific manner." This task of stating the whole law of contract in a scientific form within a small volume, Mr. Harriman has accomplished with signal success. The arrangement, as can be gathered immediately from the Table of Contents, is perfectly methodical; and his treatment of some difficult and little understood topics, such as Conditions, and the Right of a "Benefi-

ziary" to Sue, is a valuable contribution to legal science. The book is intended especially for the use of students, and is accordingly equipped with carefully selected references to cases, as much use as possible being made of well known collections of cases on the subject. It is one of the "Students' Series," compact and handy in form. That it will be useful to beginners in the law is beyond doubt; and more advanced students may well find their ideas systematized by a perusal of it.

R. G.

A MANUAL OF COMMON SCHOOL LAW. By C. W. Bardeen, Editor of the School Bulletin. Syracuse: C. W. Bardeen. 1896. (Standard Teachers' Library.) pp. iv, 276.

This admirable book, first published in 1875, "and for twenty years the only text-book on the subject in general use," has now for the first time been entirely rewritten. In its present form it is of general interest, and, it would seem, of practical necessity to the teacher. Part I., which has to do with school officers, is based almost entirely on New York law, but Part II., which relates particularly to the teacher, "is a safe guide throughout the country both in school and in court." The duties and privileges of teachers, the qualifications required of them, which are continually rising in nearly all the States, their consequently improved status as a class, and the basis on which their authority rests, are defined with clearness and such precision as the subject admits. Interesting to the lay mind is the history of the gradual diminution of the teacher's control over the child, involving as it does a discussion of corporal punishment and the increasing public sentiment against it. The author cannot be too highly commended in that, avoiding the common error of trying to draw hard and fast lines, he contents himself with illustrating by copious and apt quotation of legal decisions the various views possible on disputed points, and the application of such rules as admit of definite statement.

R. L. R.

HANDBOOK ON THE LAW OF PERSONS AND DOMESTIC RELATIONS. By Walter C. Tiffany. St. Paul: West Publishing Co. 1896. (Hornbook Series.) pp. xii, 589.

The author of this treatise is not the Mr. Tiffany who contributed the excellent volume on Sales to the Hornbook Series. But his work seems to keep well up to the standard set by his namesake. In dealing with the law of Domestic Relations, however, a writer is met by peculiar difficulties, owing to the fact that so much of the modern law on the subject, especially with regard to married women, is statutory, and the statutes of the different jurisdictions are so diverse. A full compendium of these statutes would of course be out of the question, and Mr. Tiffany has contented himself with producing an excellent summary of the common law rules on the subject, and indicating the general nature of the statutory changes that have been made. His treatment of the topics ordinarily grouped under the head of Domestic Relations is supplemented by chapters on Master and Servant and Persons Non Compotes Mentis, written by Mr. William L. Clark, Jr.

R. G. D.

HANDBOOK ON THE LAW OF TORTS. By William B. Hale, LL. B. St. Paul: West Publishing Co. 1896. (Hornbook Series.) pp. xi, 636.

This book as the author states in his Preface, is practically an abridgment of Mr. Jaggard's treatise on the Law of Torts, and was brought out to supply the demand for a single volume work along the lines of that treatise. Mr. Hale has been successful in preserving what was of value in the original, and no falling off is noted in what is new. In legal tone and theory, the book is enlightened and satisfactory. A possible criticism, in point of literary style, is that the text reads much like a systematic stringing together of the head-notes of cases, for which perhaps the many references printed at the bottom of each page are partly responsible.

R. L. R.

THE LAW OF CHARITABLE USES, TRUSTS, AND DONATIONS, IN NEW YORK. By Robert Ludlow Fowler. New York: Diossy Law Book Co. 1896. pp. xxvii, 215.

The subject of this book is one of those minor topics of the law which are distinctly enough limited to admit of separate treatment, and important enough to deserve it. When only the law of a particular jurisdiction is treated, there may be room to deal with it thoroughly within a very moderate volume. Mr. Fowler has not only given what appears to be an accurate statement of the present New York law of charities, together with such practical matter as the common forms of charitable donations, but also an excellent historical explanation of the way in which the law came to its present state. The first chapter, on the early English law of charities, is surprisingly adequate for the writer's purposes, considering its brevity. The book is well printed, and properly indexed.

R. G.

THE ELEMENTS OF JURISPRUDENCE. By Thomas Erskine Holland, D. C. L. Eighth Edition. New York: The Macmillan Co. 1896. pp. xxi, 404.

It is little more than a year since the seventh edition of Mr. Holland's valuable book appeared. A demand sufficient to warrant eight editions in sixteen years shows how highly the work is esteemed. Besides carefully revising the book throughout, the author has been able in this edition to make references to the new Civil Code for Germany that has recently become law. The sixth and seventh editions contained allusions to the draft code only, in which material changes have been made.

E. S.

THE AMERICAN DIGEST. ANNUAL. 1896. (Sept. 1, 1895, to Aug. 31, 1896.) Prepared and Edited by the Editorial Staff of the National Reporter System. St. Paul: West Publishing Co. 1896.

This year's Digest is even more bulky than any of its predecessors. It contains 6,344 columns, as against 5,447 in last year's. In convenience of arrangement it is all that could be desired.

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NO. 5.

IS MERE GAIN TO A PROMISOR A GOOD CONSIDERATION FOR HIS PROMISE?

A CONSIDERATION for a promise is generally defined to be "some gain to the promisor, *or* some loss to the promisee," using the words gain or loss in the broadest sense; or, as more fully stated by the Court of Exchequer Chamber in *Currie v. Misa*,¹ "A valuable consideration in the sense of the law may consist either in some right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other." Many other judges, as well as many elementary writers, have defined the word in this alternative form.

The question arises, Is mere gain to the promisor without some corresponding loss to the promisee ever a sufficient consideration?

An eminent writer whose views upon any legal question are entitled to the highest respect, seems to think not. Having defined consideration to be "the thing given or done by the promisee in exchange for the promise," he subsequently adds: "It is clear from this definition of a consideration that it must move from the promisee. Indeed, it is of the very essence of consideration that it be received from the promisee. What is received from one person cannot possibly be a consideration for a promise to another person."

¹ L. R. 10 EX. 162.

No doubt, in the vast majority of cases, the consideration is at the same time a benefit to the promisor, and also a loss or detriment to the promisee, and in that case the consideration is received from the promisee; but is loss to the promisee always absolutely essential?

What "thing is given or done" by a pecuniary legatee, that enables him to recover at law upon the express promise of the executor to pay the legacy, (where he has received sufficient assets therefor,) as held by Lord Mansfield and the other judges of the King's Bench in *Atkyns v. Hill*¹ and *Hawkes v. Saunders*,² and by the Supreme Court of Pennsylvania in *Clark v. Herring*?³ The cases in Cowper seem to have been approved by the Supreme Judicial Court of Massachusetts in *Swazey v. Little*,⁴ although a statute in that State made it unnecessary to rest the decision on the common law rule. They are not overruled, as sometimes thought, by *Deeks v. Strutt*,⁵ since the only question there was whether a promise to pay a legacy would be *implied* against the executor merely from the receipt of sufficient assets and a part payment of the legacy; not whether an express promise would be valid. See *Doe v. Guy*.⁶

Why can a creditor of a deceased person recover on the written special promise or note of an executor or administrator to pay the debt of the deceased if he has received sufficient assets from the estate so to do, as so frequently held in the authorities?⁷ Is there any loss to the promisee in such cases?

In *Reech v. Kannegal*,⁸ it was held that "at law if an executor promises to pay a debt due from the testator, a consideration must be alleged, as, *of assets come to his hands*, or of forbearance, or if admission of assets is implied by the promise." No doubt, forbearance by a creditor to sue, or to take out administration, if he had a right so to do, would be one good consideration for the note of the executor, devisee, or widow, as in *Templeton v. Bascom*⁹ and *Carpenter v. Page*.¹⁰ But is that the only consideration

¹ Cowper, 283 (1775).

⁴ 7 Pick. 299 (1828).

² Ib. 289.

⁵ 5 T. R. 690.

³ 5 Binney, 33 (1812).

⁶ 3 East, 120.

⁷ 2 Wms. Ex. 1673; Sch. on Ex., § 255; Daniel on Neg. Ins., § 263; *Trewinian v. Howell*, Cro. Eliz. 91 (1588); *Faxon v. Dyson*, 1 Cranch C. C. 441 (1807); *Sleighter v. Harrington*, 2 Murphy (N. C.), 332 (1818); *Childs v. Monies*, Brod. & Bing. 460 (1821); 5 Moore, 282; *Bank of Troy v. Topping*, 13 Wend. 557 (1835); *Thompson v. Maugh*, 3 Iowa, 342 (1852).

⁸ 1 Ves. Sr. 126.

⁹ 33 Vt. 132.

¹⁰ 144 Mass. 315.

that will suffice? It is true that in *Rann v. Hughes*¹ the executor was not held liable on his special promise; but neither forbearance nor receipt of assets was even *alleged* in that case; so that no consideration of any kind was claimed to exist.

Again, if a devisee of land, which is charged by the testator with the payment of a pecuniary legacy, expressly promises to pay the same, the promise may be enforced at law by the legatee. *Beeker v. Beeker*; ² *Van Orden v. Van Orden*; ³ *Kelsey v. Keyo*; ⁴ *Tole v. Hardy*.⁵ But surely the legatee gives nothing for such promise; and without it he could not recover at law; so that the express promise is the only ground of liability. *Pelletrace v. Rathbone*.⁶

If a depositor in a bank gives his creditor his check thereon, in payment of his claim, and the bank expressly promises such holder to pay the check to him, he can maintain an action against the bank for a subsequent refusal to do so. Why? What consideration does such promisee furnish the bank in exchange for the promise? What loss is sustained, what right parted with, what obligation assumed, what change of status suffered by the promisee? If A assigns to C a claim against B, and B expressly promises C to pay the same to him, C can recover upon that promise in his own name. Why? What consideration does C give B for the new promise? That such new promise must have a new consideration to support it is clear. Is not the consideration found in the fact that the promisor is, after such promise, no longer liable to a suit by the assignor and original creditor, and so some gain or advantage results or is supposed to result to him, but without any loss to the promisee? *Burroughs v. Glover*.⁷ And see *Liver-side v. Broadbent*.⁸

What consideration does a *gratuitous* indorsee and holder of a negotiable note advance, that enables him to enforce payment against the maker, where the latter has received a valuable consideration from the payee? Is not the sole consideration the benefit received by the promisor without any loss sustained by the promisee? Is not the acceptor of a draft liable to the drawee, if at all, because he has received, or is conclusively supposed to have received, a valuable consideration from the *drawer*; and not

¹ 4 Brown P. C. 27; 7 T. R. 350, note (1778).

² 7 Johns. 99 (1810).

³ 10 Johns. 30 (1813).

⁴ 3 Cow. 133 (1824).

⁵ 6 Cow. 333 (1826).

⁶ 18 Johns. 428 (1821).

⁷ 106 Mass. 325.

⁸ 4 H. & N. 610.

because of any detriment, loss, or disadvantage to the promisee or payee of the draft? No doubt a bill or note, if negotiable, or containing the words "value received," *prima facie* imports a consideration of some kind, but that does not indicate at all whether such consideration was loss to the promisee or gain to the promisor.

If a note reads "For value received of A. B., I promise to pay C. D., or order, one hundred dollars on demand, with interest," cannot C. D. recover on that note, although he gave no consideration for it, and sustained no loss or detriment?

If the holder of a promissory note says to the maker, "I feel uneasy about this note, I wish you would get A. B. to guarantee it"; and thereupon the maker, for a consideration wholly advanced by himself, procures A. B. to write his guaranty upon the back of the note, with the knowledge and assent of all parties, cannot the holder recover upon that guaranty although he has given nothing for such guaranty? Of course he could if he agrees to forbear suing upon the note, since he then furnishes part of the consideration in the suspension of his right; but suppose this transaction takes place before the note is due, and when there is no right of action to suspend, what then? Is the guaranty nugatory?

Of course, also, upon the strict principles held in some courts, there should be in such case a *privity* between the holder of the note and the guarantor; for some courts hold that if the latter, merely by an arrangement with the maker, unknown to the holder, and without his request, signs a guaranty for the note, the holder could not, upon afterwards hearing of the guaranty, enforce it; since privity of both parties in both the promise and the consideration is necessary to sustain the action. *Ellis v. Clark*; ¹ *Pratt v. Heddon*.² But the question still remains, if the holder of the note was present when the guaranty was made, and assented to it, and so became privy to the *promise*, is it absolutely necessary that he should also part with something, in order to enable him to recover upon such promise of guaranty, if the guarantor has in fact received some valuable consideration from the maker of the note?

This principle does not apply merely to negotiable paper. In *Doty v. Wilson*,³ the defendant, having been arrested by a sheriff on execution, was allowed to go at large, for which act the sheriff

¹ 110 Mass. 389.

² 121 Mass. 116.

³ 14 Johns. 378 (1871).

was compelled to pay the amount of the debt to the execution creditor. Subsequently the defendant promised the sheriff to repay him the amount so paid, and the sheriff recovered on such promise. What consideration did he give in exchange for it?

If A pays to B a debt he owes him, and afterwards B recovers judgment against A for the same claim, because A neglected to plead payment and produce his receipt, A cannot, without a new promise by B to refund, recover back the sum paid; but with a new promise he can. *Bentley v. Morse*.¹ But what consideration does A furnish for this new promise?

In *Ridout v. Bristow*,² a widow of a debtor, being also his administratrix, gave the creditor her note for the amount of the debt, expressed to be for "value received by my late husband." The creditor recovered on the note without any proof of any loss, surrender of any right, or waiver of any claim by him, although want of consideration was set up in defence.

What supports a promise by A to pay B for doing exactly what B was already bound to do by a prior contract with C? What new consideration, loss, or detriment to B exists in such cases? Is not the promise binding on A solely from the supposed gain, advantage, or satisfaction ensuing to him from performance of the promise, and without any increased damage, loss, or cost to B than had already been paid for by C?

For instance, if A contracts with B to erect a house, and complete it ready for occupation by a certain day, and C intends to occupy it as a tenant on that day, but, learning that it may not be ready, offers to pay A an additional one hundred dollars if he will surely finish it at the stipulated time, which is done, and C moves in on the very day, is he not liable to A for the promised compensation? Still more obviously, if A had refused to complete the house for B, and was finally induced to do so only by the additional promise of C.

Shadwell v. Shadwell,³ in the Common Pleas, is the earliest case on this point, in which the uncle of the plaintiff promised to pay him one hundred and fifty pounds sterling a year upon his intended marriage with a certain lady to whom he was already engaged. Subsequently the marriage took place according to the original agreement, and the defendant paid the annuity for several

¹ 14 Johns. 468 (1817).

² 9 C. B. N. S. 159 (1860).

³ 1 Tyrw. 84; 1 Cr. & J. 231 (1830).

years, and on default to continue payment the promise was held to be upon sufficient consideration.

Scotson v. Pegg,¹ in the Exchequer, followed soon after, in which, in consideration of the plaintiff's promise to deliver a cargo of coal to the defendant, he promised the plaintiffs to unload the same in a certain number of days, but did not do so for five days beyond the time, whereby the plaintiffs were put to expense in keeping and maintaining the ship, master, and crew for the extra time. The defence was that the defendant's promise was without consideration, because the plaintiffs had previously bound themselves to other persons to deliver the coal to them, *or their order*, and that said persons, having sold the cargo to the defendant, had ordered the plaintiffs to deliver the coal to the defendant, as they well knew. This fact was admitted on demurrer, but the plaintiffs' second promise was held to be a good consideration for the defendant's promise, although they were under prior contract with others to do the very same thing, and so the defendant's promise was held binding, and the plaintiffs had judgment. Wilde, B. said: "If a person chooses to promise to pay a sum of money in order to induce another to perform that which he has already contracted with a third person to do, I confess I cannot see why such a promise should not be binding. I accede to the proposition that, if a person contracts with another to do a certain thing, he cannot make the performance of it a consideration for a new promise to the same individual. But there is no authority for the proposition that where there has been a promise to one person to do a certain thing, it is not possible to make a valid promise to another to do the same thing." Martin, B. added, "The defendant gets a benefit by the delivery of the coals to him, and it is immaterial that the plaintiffs had previously contracted with third parties to deliver to their order."

This subject was fully examined in a late case in Massachusetts, *Abbott v. Doane*,² in which the two preceding English cases were followed. The facts were that the plaintiff had signed an accommodation note to a corporation, which the latter had procured to be discounted at a bank for such corporation's own benefit. The note not being paid at maturity, the defendant, who was a stockholder, director, and creditor of said corporation, wished, *for some advantage to himself*, to have the note paid at once; and accordingly

¹ 6 H. & N. 295 (1861).

² 163 Mass. 433 (1895).

gave the plaintiff another note for the same amount, in consideration that the plaintiff would pay his note to the bank, which the plaintiff did. In a suit upon this second note, the defendant contended that his note was without consideration because the plaintiff was already bound in law to pay his own note to the bank, although it was an accommodation note given for another. But the defence was not sustained; Mr. Justice Allen saying, after citing many cases bearing on the subject, "It seems to us better to hold as a general rule, that if A has refused or hesitated to perform an agreement with B, and is requested to do so by C, who will derive a benefit from such performance, and who promises to pay him a certain sum therefor, and A thereupon undertakes to do it, the performance by A of his agreement in consequence of such request and promise by C is a good consideration to support C's promise."

This is very carefully stated, and due prominence is given to the important facts that A has refused to perform his agreement with B, that C is pecuniarily interested in such performance, and that A is finally induced to perform it by the promise of C.

Brownell v. Lowe,¹ sometimes cited as *contra*, tends on the other hand, so far as it goes, to sustain the same view. There the plaintiff had contracted with a railroad company to build a section of the road, the work not to commence until the company had provided the means of making payments according to the terms of the contract. The company not having provided sufficient means of payment, the plaintiffs refused to proceed with the work. Thereupon, the defendants, being interested in the performance of the work, promised the plaintiffs to pay them the money, and the work was completed. The defendants were held bound by the promise, notwithstanding this defence was set up.

In some other cases, cited in opposition to this view, in 8 HARVARD LAW REVIEW, 27, there was no apparent benefit to the promisor, nor any loss to the promisee; that is, no loss which he was not already under obligation to undergo. Of course, therefore, no such promise could be held valid.

Thus, in *Davenport v. First Congregational Society*,² which was a promise by the plaintiff to relinquish his claim against a religious society, if they would promptly pay a former pastor what was due him, which they did. In such case there was neither loss to the promisee (the society) nor gain to the promisor.

¹ 117 Ind. 420 (1888).

² 33 Wis. 387.

The same may be said of *Johnson v. Sellers*.¹ The plaintiff had contracted with the trustees of an educational institution to take charge of the same with his wife as co-principal. Some question having arisen as to the plaintiff's obligation to bring his wife with him, the defendant, a trustee of the institution, promised to give him twenty-five hundred dollars if he would do so, which he did, and they taught a prosperous school. There was no evidence that the performance was of any benefit or advantage to the defendant. The court, while admitting the doctrine that one of two parties to a contract may waive performance by the other, and agree to pay more for its fulfilment than the original contract called for, held that a promise by a *third party* to induce its performance, or rather to prevent its breach, was not supported by a valid consideration.

The many cases of promises by the *original promisor* to pay an additional amount to the *original promisee* for merely performing his *original promise*, do not furnish much light on either side of the question now under consideration.

Those cases which hold that such second promise is binding, of which *Munroe v. Perkins*² is a type, proceed upon the ground that the first contract was abandoned by the parties, and a new one mutually substituted therefor.

On the other hand, the many authorities that deny the validity of such second promise, do so on the ground of public policy, or to prevent extortion, etc. Such are the promises to pay sailors extra wages, and witnesses, or officers of the law, extra fees, for merely doing a legal duty. See *Harris v. Watson*; ³ *Stilk v. Myrick*; ⁴ *Bartlett v. Wyman*; ⁵ *Collins v. Godefray*; ⁶ *Dodge v. Stiles*; ⁷ *Callaghan v. Hallett*; ⁸ and many others.

Looking at the subject in a practical light, is there any real objection to allowing a person of full age and sound mind, and in every way *sui juris*, to promise to pay for anything of value to him, and which he receives and enjoys in consequence of the promise, merely because some other person has promised to pay for what benefit he also received or expected to receive from the same transaction? If gain to the promisor merely can ever be a good consideration, there does not seem to be any legal difficulty in the way; if not, there is.

Edmund H. Bennett.

BOSTON, December 1, 1896.

¹ 33 Ala. 265 (1858). ⁴ 6 Esp. 129; 2 Camp. 317 (1809). ⁷ 26 Conn. 463 (1857).

² 9 Pick. 298. ⁵ 14 Johns. 260 (1817). ⁸ 1 Caines, 106 (1803).

³ 1 Peake, 102 (1791). ⁶ 1 B. & Ad. 950 (1830).

ACTIONS QUI TAM¹ UNDER THE PATENT STATUTES OF THE UNITED STATES.

SECTION 4901 of the Revised Statutes of the United States, as part of the Acts relating to Patents, provides for penalties in case any one shall attempt to deceive the public into believing that articles of his manufacture are protected by patent, either, 1. by marking them in such a way as will lead to the belief that they are made under the authority of an actually issued patent, with the consent of the patentee, when in fact no such consent has been given; or, 2. by marking the articles "patented," or with words and symbols having like effect, when in fact they are not patented at all. The obvious intent of the section is to punish persons who fraudulently attempt to impose upon the public the belief that they are enjoying a monopoly in the articles so marked, when in fact they are not.

The section in question reads as follows: —

"Sec. 4901. Every person who, in any manner, marks upon anything made, used, or sold by him for which he has not obtained a patent, the name or any imitation of the name of any person who has obtained a patent therefor without the consent of such patentee, or his assigns or legal representatives; or

"Who, in any manner, marks upon or affixes to any such patented article the word 'patent' or 'patentee,' or the words 'letters-patent,' or any word of like import, with intent to imitate or counterfeit the mark or device of the patentee, without having the license or consent of such patentee, or his assigns or legal representatives; or

"Who, in any manner, marks upon or affixes to any unpatented article the word 'patent,' or any word importing that the same is patented, for the purpose of deceiving the public, shall be liable, for every such offence, to a penalty of not less than one hundred dollars, with costs; one half of said penalty to the person who shall sue for the same, and the other to the use of the United States, to be recovered by suit in any district court of the United States within whose jurisdiction such offence may have been committed."

¹ *Qui tam* or popular actions are so called because instituted by a person "*qui tam pro domino rege quam pro seipso sequitur*." Stephens, Commentaries, vol. iii. p. 436.

This statute, like all statutes providing for the imposition of penalties, is construed with the utmost strictness; and in all matters pertaining to suits to recover penalties under the statute the most rigorous rules of procedure are enforced against the person posing as the informer. Only in criminal actions are matters of doubt so consistently resolved in favor of a party prosecuted as in actions *qui tam* under this or other statutes providing for penalties. The rule enunciated in *Ferrett v. Atwell*,¹ namely, that "the language of the statute is to be particularly adhered to in the construction of penal laws," is uniformly followed.

Thus only a *person* can be an informer under the statute. Even the United States, which as a collateral party is interested in a suit to recover penalties under the act to the extent of one half the sum recovered, cannot through its attorney be an informer.² The form of remedy and the manner in which it must be sought are clearly pointed out by the statute, and must be strictly followed. Undoubtedly the rule in *Ferrett v. Atwell* (*supra*), that the "person" of the statute must be a *single* person, and cannot be more than one, nor a corporation, although directly applied to an action for penalties under § 4963 of the Revised Statutes of the United States relating to copyrights, would be enforced in a case under the Patent Act should the emergency arise.

The action under the statutes is not in contract, nor analogous to contract. No right to any sum of money or to the performance of any obligation vests in the plaintiff or informer until after verdict and judgment, when the money is assumed to be ready for distribution between the United States and the informer.³

The fact that the damage or penalty is fixed at a definite sum for each offence is merely an accident of the statute, so to speak, and does not make the action for such penalty *quasi ex contractu*.⁴

This classification of actions under the statute in question as actions in the nature of tort is of greater importance than in the discussion of actions for penalties under State statutes, for the reason that under the statutes of most if not all of the States special provision is made for the survival of actions sounding in tort after the death of a party thereto, whereas there is no statute

¹ 1 Blatch. 151.

² *United States v. Morris et al.*, 2 Bond, 23.

³ *Twenty-five Thousand Gallons of Distilled Spirits*, 1 Benedict, 367.

⁴ *Chaffee v. United States*, 18 Wall. 516, 538.

of the United States which provides for the survival of actions; the State statutes providing the rule in every instance.¹

So that, while the proper classification of actions for penalties under State statutes becomes a question of scientific attractiveness merely, such classification assumes a real interest when the Federal statutes are in question. There we are thrown upon the rule of common law, stated in Williams, Executors, 9th ed., p. 697, as follows: —

“But it was a principle of common law that, if an injury was done either to the person or the property of another for which damages only could be recovered in satisfaction, the action died with the person to whom or by whom the wrong was done. Thus, when the action was founded on any malfeasance or misfeasance, was a tort, arose *ex delicto*, . . . and the plea under the old pleading must have been ‘not guilty,’ the rule was ‘*actio personalis moritur cum persona*.’”

And the Statute 4 Edw. III. c. 7, by which it was provided that an executor could maintain such an action as the testator might have had in his lifetime, even though the action sounded in tort, if the tort was of such a nature that it rendered the estate less beneficial to the executor than otherwise it would have been, does not apply to actions for penalties under the Federal statutes.²

When the precise nature of such an action *qui tam* is scrutinized, it becomes clear that there is but one answer to the question whether it survives. Reason answers this question in the negative, because an executor cannot, in the nature of things, continue an action for the estate which he could not bring for the estate. Section 4901 of the Revised Statutes, upon which an action is brought, expressly provides for a *person* to sue for the penalty. An executor, therefore, representing an *estate* cannot begin an action *qui tam* under this act, *as an executor*. Therefore neither can an executor *continue* such an action for a plaintiff deceased.

So, unless special statutory provision can be found whereby the action under § 4901 may be made to survive the party, then death of either party before verdict abates the suit, because at common law the death of a party to an action in tort abated the suit.³

¹ Jones v. Van Zandt's Adm'r, 4 McLean, 604; United States v. De Goer, 38 Fed. Rep. 80.

² United States v. De Goer, *supra*.

³ Hatch v. Eustis, 1 Gall. 160.

Section 955 of the Revised Statutes of the United States does not throw any light on the question; it merely enacts that an executor may prosecute or defend an action in the Federal courts *if such action survive by law*. The law referred to is the law of the State in which the action has been brought.

No State statute can apply to an action *qui tam* under the United States statutes, because the action is not one which can in any event be tried in the courts of the State, for it involves no subject matter which is cognizable, either by the courts or the legislatures of the States. A State statute providing that all actions *qui tam* for penalties should survive would have no effect on actions in the Federal courts brought under a Federal statute. Such actions have their root in the United States statutes, and nowhere else.¹

The District Court of the United States for Massachusetts has recently followed this rule of law, holding that an action under § 4901 of the Revised Statutes abates by the death of the plaintiff, and cannot be revived or continued by his executor.²

While the intent of Congress in enacting § 4901 of the Patent Acts was presumably to throw a healthful restraint in the way of unscrupulous persons who might be tempted to deceive the public, and while it is reasonable to assume that such restraint has been exercised by the statute; on the other hand one may infer from the manner in which the Federal courts have dealt with actions under the act that the informers themselves are not regarded as above reproach. Doubtless many such actions have been brought for the sake of intimidation, not to say blackmail, in cases where the facts did not warrant an information. Whether this is so or not, if any person contemplating bringing an information under § 4901 became acquainted with the decisions of the courts on the subject, any preconceived impression that wealth was easily to be obtained by the process would be dispelled. The reported cases are not numerous, but each one seems to impose a restriction upon the operation of the statute in addition to those imposed by its fore-runner.

The usual mode of committing the offence against the statute is by marking unpatented articles "patented," as provided for by the third paragraph of § 4901. The name or mark used by a genuine patentee is very seldom borrowed without license.

¹ *Schreiber v. Sharpless*, 110 U. S. 76; *United States v. De Goer*, *supra*.

² *Marshall v. Clinton Wall Trunk Co.* (not reported).

As to the burden of proof. The plaintiff in order to prevail must prove beyond a reasonable doubt that the marks were affixed to unpatented articles by the defendant, that they were so affixed with intent to deceive the public, and that the articles were unpatented. The intent to deceive must accompany the specific act of marking, and no intent of subsequent origin has any effect to bring the defendant within the statute. Nevertheless, acts committed by the defendant both before and after the marking may be inquired into for the purpose of determining the actual intent at the time of marking.¹

The ease with which a defendant can clear himself of the imputation of evil intent is suggested by the rule adopted in *Nichols v. Newell*, namely, that if any portion of the articles complained of were marked innocently, and if the plaintiff has not clearly distinguished between the innocent and guilty acts, then it shall be presumed that all the articles complained of were marked innocently.

“After taking all the evidence together, if it can be reasonably and fairly reconciled with defendants’ innocence, then they are not proved to be guilty, although it may be fairly and easily reconciled with the supposition that they committed the acts charged.”¹

But much latitude in the admission of evidence is permitted in such cases, because questions of fraud and deceit are involved.²

One case offers a reasonable rule by which the question of intent may be tested, and guards against so strict an interpretation of the statute as will effectually render it a dead letter. In *Tompkins v. Butterfield*³ the court instructed the jury that recklessness on the part of a defendant in affixing the word “patented” to articles of his manufacture is, in the absence of proof to the contrary, sufficient to establish his guilt. Thus, while a defendant who owns a patent is given the benefit of any reasonable doubt, and permitted to hold any plausible opinion that the articles marked by him do in fact fall within the descriptions of his patent,⁴ there is a limit to the excusable elasticity of his imagination.

In giving defendants in such cases the benefit of every reasonable doubt, the courts will always, it is believed, extend to a patent

¹ *Nichols v. Newell*, 1 Fisher, 647.

² *Walker v. Hawzhurst*, 5 Blatch. 494.

³ 25 Fed. Rep. 556.

⁴ *Lawrence v. Holmes, Booth, and Hayden*, 45 Fed. Rep. 357.

actually owned by the defendant the most liberal interpretation consistent with reason. His patent claims will be taken at their face value, and no extrinsic circumstances will be considered for the sake of criticising or limiting the scope of the claims thereby. If therefore the article marked by the defendant and the thing purported to be secured by his patent can be fairly judged to be akin to each other, he cannot be found guilty.¹

Even if the court upon which devolves the matter of interpreting and determining the scope of the defendant's patent² is of opinion that the defendant was wrong in believing that the articles marked fell within the operative scope of his patent, this does not fasten upon him the guilty intent.

"The fact that the label was untrue does not preclude the defendant from showing that he had adequate reason to believe that it was true, and that he had taken competent and authoritative advice upon the subject."³

Where corporations are involved, the intent of the officer or servant of the corporation does not become the guilty intent of the corporation unless his act in fraudulently marking articles was done in the exercise of properly conferred authority.⁴

The mere fact that an officer of a corporation is doing the corporation's business in making or selling goods does not make a fraudulent act in marking them "patented" the act of the corporation. The intent in such a case is special and peculiar, and the knowledge or intent of an officer does not affect the corporation unless he is acting under some specially conferred authority.⁵

Although this strict rule is not always enunciated,⁶ it seems highly probable that an informer, in order to fasten guilty intent upon a corporation, would be required to prove either a special authority conferred upon an officer or servant, or the equivalent of such authority lying in tacit consent to the commission or a repetition of the offence.

The courts before which came the earlier cases under this statute were of opinion that in order to constitute an offence the marking must be upon a *patentable* as well as an *unpatented* article.

¹ *Lawrence v. Holmes et al.*, *supra*.

² *Hawloetz v. Kass*, 25 Fed. Rep. 765.

³ *Lawrence v. Holmes et al.*, *supra*; *Hotchkiss v. Cupples Co.*, 53 Fed. Rep. 1018.

⁴ *Tompkins v. Butterfield*, *supra*.

⁵ *Lawrence v. Holmes et al.*, *supra*.

⁶ *Hotchkiss v. Cupples Co.*, *supra*.

Thus, unless the article in question was obviously patentable, the informer was required to aver and prove that the thing on which the word was placed was legally the proper subject for a patent.¹

If this holding had not been promptly overruled, it would doubtless have been modified to mean that the article marked must appear to be, or be averred to be, such a one as might be considered patentable by the ordinarily reasonable man. Even this softening of the old rule leaves much to be desired, for who shall be sure of his opinion when experts disagree? Only in such cases where a court can say, out of its judicial knowledge of commonplace things, that the article complained of has never been patented and cannot be patented, will the declaration be demurrable on the ground taken in *United States v. Morris*.² Under this rule, should the case of obvious unpatentability arise, an averment that the article was patentable would be idle as against manifest truth. But all this exception can amount to is that no statutory offence will be found when the marking was evidently so ridiculous that deceit stood out of the question. A man may mark his cows "patented" with impunity so far as the statute is concerned, even if his actual intent to deceive the public is of the most virulently evil character.

With equal reason the courts hold that there is no offence against the statute in marking goods with the date and number of an expired patent; the public is presumed to know the term of United States patents.³

In treating cases which arise under this statute, inquiry must be directed to the critical period in the transaction, namely, the time when the marks were affixed.

If, at the time when the word "patented," or words and marks of like import, were affixed to the article there was no guilty intent, then subsequent development of an intent to deceive is of no consequence, and is insufficient to support an information. Marks applied in the honest expectation that a patent is presently to be granted are innocent.⁴

Thus, where a defendant was charged with unlawfully affixing patent marks in Cincinnati, and with renewing the offence by bringing the goods marked for sale into New York, the court in the District of New York held that the act provided for by the

¹ *United States v. Morris*, *supra*.

² *Olliphant v. Salem Flouring Mills*, 5 Sawyer, 138.

³ *Wilson v. Singer Mfg. Co.*, 12 Fed. Rep. 57.

⁴ *Ferrett v. Atwell*, 1 Fisher, 647.

statute was completed in Cincinnati, and that no subsequent "uttering" of the marks in another district than that of Ohio in any manner constituted a punishable offence. Though the acts done subsequently to the unlawful marking may in themselves be far more deceitful and harmful than the mere marking, they do not fall within the operation of the statute, which as a penal statute must always be strictly construed, and be confined in its operation to acts which come plainly and literally within the meaning of the language employed.¹

The damages which may be assessed and imposed as a penalty for any one offence are according to the statute "not less than one hundred dollars." When the courts of the United States were first called upon to construe the statute, the expression "not less than one hundred dollars" led to the instruction to a jury that they were to find damages in not less than one hundred dollars for each offence, and as much more as they chose to assess.²

But, for the reason that the terms of the statute did not provide for any maximum limit of penalty, the courts soon departed from this liberal treatment of the statute, and held that no more than one hundred dollars should be assessed as the penalty for any one offence. In *Stimpson v. Pond*³ the matter was regarded as a question of doubt, although the court (Curtis, J.) was decidedly of opinion that the statute did not authorize the infliction of a penalty greater than one hundred dollars for each offence. Whether the weight of the mere opinion of so distinguished a judge, or the obvious perils of leaving so serious a matter as the estimation of the amount of a penalty to a jury, has influenced the courts does not appear; but all cases after *Stimpson v. Pond* have apparently proceeded upon the assumption that Mr. Justice Curtis's opinion was a sound one, and that the proper rule of construction of the statute in this respect is to restrict the penalty to the only precise sum named in the statute.

This amount, if multiplied by a large number, representing successive fraudulent markings of unpatented articles, or markings without the authority of the true patentee, enables an informer to lay his damages or penalties in a very liberal sum.

Doubtless the statute has appealed to some informers as an open road to great and sudden wealth; for in recent years, when manufactured articles are produced by thousands by a single manu-

¹ *Pentlarge v. Kirby*, 19 Fed. Rep. 501; *Hotchkiss v. Cupples Co.*, 53 Fed. Rep. 1018.

² *Nichols v. Newell*, 1 Fisher, 747.

³ 1 Curtis C. C. 502.

facturer, a series of wanton errors in the matter of marking goods may enable the informer to figure up his rewards in millions. If he believes, however, that the only duty which devolves upon him as a plaintiff is to prove the manufacture and marking of a number of articles, with such words as the statute prescribes, and to show further that no patent exists under which the marking can be justified, leaving the matter of guilty intent to inference (as in *Tompkins v. Butterfield*, *supra*) he pursues a phantom. The courts have jealously guarded the operation of the statute, so that a defendant who is brought to trial may only be fairly punished, and an informer reasonably rewarded. The treatment of cases arising under § 4963 of the Revised Statutes, which provides for penalties in case the word "copyright" shall be falsely applied to uncopyrighted articles, is precisely the same as that of cases under the patent statute; so that the two classes of cases may be discussed together.

The question arose whether more than one penalty can be imposed in a case where two thousand chromos, wrongfully marked "copyrighted," were printed each day for twenty-five consecutive days, the chromos struck off on the successive days being identical except for the names of different persons printed thereon, by way of advertisement. It was held that only where the continuity of an act is broken by lapse of time, or other circumstances, can there be found to be more than one offence. Here the acts were continuous, and without variation, so that there was in law but one offence.¹

Likewise, where several unpatented articles are falsely marked patented, and the marking is done so that the whole is one continuous act, then but one offence is committed, and only a single penalty can be recovered, although many articles may have been marked.²

Obviously, under such a rule of construction as this, there must also be clearness and definiteness in the pleadings of an informer. Where an informer averred in one count that the defendant had marked ten thousand uncopyrighted articles "copyrighted," and prayed judgment for one hundred dollars for each alleged fraudulent marking, it was held on demurrer that the declaration was bad, since it joined ten thousand separate causes of action in one

¹ *Taft v. Stephens Litho. Co.*, 39 Fed. Rep. 781.

² *Hotchkiss v. Cupples Co.*, *supra*.

count. So liberal a misjoinder as this is perhaps without parallel. The court stated expressly that, where the printing of many copies is a single continuous act, but one offence is committed. There should be a clear divergence as to each transaction, both as to time and circumstances.¹

It is clear, after a consideration of the cases under this statute, that the strictness of construction adopted by the courts, the heavy burden of proof which is imposed upon the informer, and the obvious difficulty of proving a fraudulent intent on the part of a defendant, combine to dissuade a person from undertaking the expense and trouble of litigation merely for the sake of plunder. Only a genuinely interested or inspired individual is likely to turn informer; and others are easily dissuaded from lodging complaint so soon as the true nature of their prospects is made clear to them.

It is more than likely, therefore, that actions *qui tam* under the patent statutes will continue to be a rarity in the Federal courts.

Odin B. Roberts.

¹ Taft *v.* Stephens Litho. Co., 38 Fed. Rep. 28. See also United States *v.* Eagan, 30 Fed. Rep. 498.

UNFAIR COMPETITION.

UNFAIR competition, as the designation of a legal wrong which the law will undertake to redress or prevent, has only of late years begun to make its appearance in the books. To most lawyers, it is safe to say, the title carries no very definite meaning, for as yet its use is almost entirely confined to the reports, and in these it is used only in the most general way, and always with the facts of the particular case in view, while it is quite unrecognized in digest, text-book, or dictionary.

This is not to say there is no Unfair Competition literature, for the fact is otherwise. Mr. Sebastian in his book upon Trade Marks has a chapter entitled "Cases Analogous to those of Trade Mark," which cites the cases. Mr. Browne¹ also has a chapter on "Rights Analogous to those of Trade Marks," while Mr. Kerly² discusses the cases under the title of "The Action for 'Passing Off.'"

This method of treatment regards as unimportant whatever variation may exist among the so called "analogous" cases *inter se*, and is content to regard this law as a mere parasite upon the trade mark branch. The growing importance and the increasing amount of this new law, not only absolutely but also relatively to trade mark law, makes it certain that a treatment of these cases more in keeping with the present and prospective relative importance of the two branches must soon be accorded by the text writers. In the mean time it seems worth while to attempt some examination of these cases, and it will be the object of this paper to indicate very briefly indeed the relations and the differences among these so called "analogous" cases, and between these cases and trade mark cases, and to notice some of the principal rules and distinctions which have been settled, or which are now in process of settlement.

Logically speaking, the fact is that Unfair Competition is properly a generic title, of which trade mark is a specific division. Practically, however, the earlier development of the law of trade marks has fixed a different arrangement and has established trade

¹ Browne on Trade Marks.

² Kerly on Trade Marks.

marks as an independent title in the law. The scope of the generic name must therefore be correspondingly restricted.

There is another consequence of the earlier development of trade mark law to which it is important as a practical matter to direct attention, namely, the firm hold which the strict rules of technical trade mark and the trade mark terminology have acquired in the legal mind, with the consequent and very confusing result that a great number of Unfair Competition cases are argued and decided in terms of trade mark, while other cases of Unfair Competition are tried and decided upon theories applicable only to technical trade mark cases.¹

For the purposes of this article it will be convenient to state a few typical cases of Unfair Competition.

Knott v. Morgan,² decided in 1836, is the first, or almost the first, case of Unfair Competition. There, omnibuses of the London Conveyance Company being painted, and their servants clothed, in a special and distinctive manner, the defendant began to run omnibuses similarly painted, with servants similarly clothed. An injunction was granted.

¹ In *Enoch Morgan's Sons Co. v. Wendover*, 43 Fed. Rep. 420, the complainant had a trade mark in the word "Sapolio," used to designate a particular kind of soap. When persons called at defendant's shop and asked for "Sapolio," the defendant's salesman would, without explanation, pass out a soap called "Pride of the Kitchen," on which these words were plainly marked, and receive the customary price. The wrappers of the two soaps differed entirely, and also the size and shape of the cakes. Held, although no use of the word "Sapolio" on the soap and no resemblance in the packages, the transaction amounted to an infringement of plaintiffs' trade mark. Injunction. *Enoch Morgan's Sons Co. v. Wendover* is an illustration of a case of Unfair Competition decided in terms of trade mark.

In *Davis v. Davis*, 27 Fed. Rep. 490, the plaintiff had a trade mark consisting of a representation of a box of soap in which the soap was packed in alternate red and yellow wrappers. The defendant packed his soap in alternate red and yellow wrappers so that the box, when open, presented the appearance of plaintiff's trade mark. Held, that this was not an infringement of plaintiff's trade mark, and an injunction refused. It cannot be doubted that had the plaintiff's case been presented upon the theory that the defendant's goods were "dressed" to imitate the "dress" of the plaintiff's goods, as was undoubtedly the fact, and that the result was confusion in the trade, and damage to the plaintiff, the result would have been different. See *Adams v. Heisel*, 31 Fed. Rep. 279.

² 2 Keen, 213. See also *Weinstock v. Marks*, 109 Cal. 529, in which case the defendant had put up a building next to the plaintiff's building which was identical in appearance with the plaintiff's building, in consequence of which the plaintiff's customers went into defendant's shop supposing it to be the plaintiff's shop. Held, that the defendant must distinguish his building from that of the plaintiff "in some mode or form that shall be a sufficient indication to the public that it is a different place of business from that of the plaintiff."

The case marks a distinct advance in two particulars over anything previously known to trade mark law: first, that the plaintiff received protection, although he could not, in the nature of things, establish any exclusive right in himself, which had in trade mark law been regarded as essential; and, secondly, that the protection given was not to vendible goods in the market,¹ which was also an essential in trade marks.

The principle of *Knott v. Morgan*, namely, that the defendants "could not deprive the plaintiffs of the fair profits of their business by attracting custom upon the false representation that carriages really the defendants' belonged to and were under the management of plaintiffs,"² the representation being "by an accumulation of resemblances,"³ has been since applied in innumerable cases where the act complained of consisted in "dressing up," as it is called, the goods of the defendant to look like the goods of the plaintiff. In some cases the defendant made his package or "dress" an exact copy of that of the plaintiff,⁴ while in others he has been content to imitate labels, patterns, and styles,⁵ or packages and labels,⁶ or peculiarities of the package alone,⁷ or peculiar labels alone.⁸

In *Hennessy v. Hogan*,⁹ and *Hennessy v. White*,¹⁰ in the Supreme Court of Victoria, the facts were practically identical. The plaintiff was a distiller who made brandy of two qualities, the better quality being sold only in bottles, while the inferior quality was sold in bulk. The defendants purchased the bulk brandy

¹ See *Marsh v. Billings*, 7 Cush. 322; *Stone v. Carlan*, 13 Monthly L. R. 360.

² Per Lord Langdale, M. R.

³ Per Wood, V. C., in *Wallop v. Ratcliff*, 1 H. & M. 259.

⁴ *Von Mumm v. Frash*, 56 Fed. Rep. 830; *Carbolic Soap v. Thompson*, 25 Fed. Rep. 635; *Sawyer v. Horn*, 1 Fed. Rep. 24; *Frese v. Bachof*, 13 Pat. Off. Gaz. 635; *Williams v. Spencer*, 25 How. Pr. 365; *Williams v. Johnson*, 2 Bro. 1; *Abbott v. The Bakers' Asso.*, W. N. 1872, p. 31.

⁵ *Cleveland Stone Co. v. Wallace*, 52 Fed. Rep. 431.

⁶ *Sawyer v. Kellogg*, 7 Fed. Rep. 720; *Leclanch Co. v. West. Elec. Co.*, 23 Fed. Rep. 276; *Royal Co. v. Davis*, 26 Fed. Rep. 293; *Moxie Nerve Food Co. v. Beach*, 33 Fed. Rep. 248; *Jennings v. Johnson*, 37 Fed. Rep. 364; *Myers v. Theller*, 38 Fed. Rep. 607; *Morgan's Sons Co. v. Troxell*, 23 Hun, 632; *Wolfe v. Hart*, 4 Vict. L. R. Eq. 134; *Fullwood v. Fullwood*, W. N. 1873, p. 185; *Henry v. Price*, 1 Leg. Obs. 364.

⁷ *Sawyer v. Hubbard*, 32 Fed. Rep. 388.

⁸ *Meyer v. Bull*, (C. C. A.) 58 Fed. Rep. 884; *Wellman v. Ware*, 46 Fed. Rep. 289; *Estes v. Worthington*, 31 Fed. Rep. 154; *Association v. Clarke*, 26 Fed. Rep. 410; *Glen Cove Mfg. Co. v. Ludeling*, 22 Fed. Rep. 823; *The Anglo Swiss Cond. Milk Co. v. The Swiss Cond. Milk Co.*, W. N. 1871, p. 163; *Day v. Buirming*, 1 Leg. Obs. 205.

⁹ 6 W. W. & A'B. Eq. 216.

¹⁰ 6 W. W. & A'B. Eq. 225.

and bottled it as Hennessy's Brandy in bottles bearing a label sufficiently similar to that used by the plaintiff on his bottles to deceive unwary or careless purchasers. An injunction was granted.¹

In *Hostetter Co. v. Bruëggemann Co.*,² the plaintiff made and sold "Hostetter's Bitters," and owned the trade marks, brands, labels, etc., used in the business. The defendant manufactured bitters very similar in appearance and flavor, which it sold in bulk to its customers, advising them to refill empty Hostetter bottles and put them on the market as genuine. Held, that in so advising its customers it was guilty of a wrong which equity would enjoin.³

In *Merriam v. Texas Siftings Publishing Co.*,⁴ the defendant advertised a reprint of the 1847 edition of Webster's Dictionary, the copyright having expired, as "Latest edition, 10,000 new words, etc. Old price \$8, the new, low price of \$1 made possible by improvements in machinery," etc. Held, on application of the owner of the copyright of subsequent editions, that the defendant be enjoined against the further circulation of such misleading advertisements, and that, because of their already extensive circulation a printed slip must thereafter be attached to each book stating it to be a reprint of the edition of 1847.⁵

In *Cave v. Myers*,⁶ the plaintiff carried on business in Wigmore Street under the name of "H. J. Cave & Sons." The defendant, who occupied a corner shop in Wigmore Street, near by, adopted the name of "Cavendish House" for his establishment, and had it painted up by his express order over the frontage, in place of his name "Myers," in such a manner that "Cave" alone appeared upon the Wigmore Street side. Injunction.⁷

¹ *Gillott v. Kettle*, 3 Duer, 624, *accord*. See *Krauss v. Jos. R. Peebles Sons Co.*, 58 Fed. Rep. 585.

² 46 Fed. Rep. 188.

³ See *Hostetter v. Fries*, 17 Fed. Rep. 620; *Hostetter v. Von Vorst*, 62 Fed. Rep. 600; *Hostetter v. Becker*, 73 Fed. Rep. 297; *Hunt v. Maniere*, 34 L. J. Ch. 144; *Hostetter v. Anderson*, 1 Vict. Rep. Eq. 7. See also *Evans v. Von Laer*, 32 Fed. Rep. 153.

⁴ 41 Fed. Rep. 944.

⁵ *Accord*, *Harper v. Pearson*, 3 L. T. N. s. 547; *Fullwood v. Fullwood*, 9 Ch. D. 176; *Selby v. Anchor Tube Co.*, W. N. 1877, p. 191; *Thorley's Cattle Food Co. v. Massam*, 14 Ch. D. 763.

⁶ *Seton*, 4th edition, 238.

⁷ *Accord*, *Walker v. Alley*, 13 Grant Up. Can. Ch. 366; *Mallen v. Davis*, 3 *The Times* L. R. 221; *Colton v. Thomas*, 3 Brewst. 308; *Devlin v. Devlin*, 69 N. Y. 212; *Genin v. Chadsey*, cited 2 Brewst. 330; *Hookam v. Pottage*, L. R. 8 Ch. 91; *Glenny v. Smith*, 13 L. T. N. s. 11; *Scott v. Scott*, 16 L. T. N. s. 143.

Imitation of the name of a hotel was restrained in *Howard v. Henriques*,¹ *Woodward v. Lazar*,² *McCardell v. Peck*,³ and *Wood v. Sands*,⁴ and imitation of an address in *The Glen & Hall Mfg. Co. v. Hall*.⁵

In *Orr, Ewing & Co. v. Johnson*,⁶ the plaintiffs had an unregistered trade mark for yarn of which a picture of two elephants was a feature. Owing to this, the plaintiffs' ticket had acquired among the natives of India the name "Bhe Hathi," or "Two Elephant" ticket. The plaintiffs' trade mark had been refused registration on the ground that "elephant" trade marks were common to the trade. The defendant began to export yarn, and to place upon it a ticket of a similar shape and a similar color to plaintiffs' ticket (the shape and color being common to the trade), and having upon it two elephants differing in appearance. Held that, though it was not probable that English purchasers or Indian dealers would be deceived, it was not improbable that the ultimate purchasers in India would be, in consequence of the defendant's ticket being calculated to obtain the same name of "Bhe Hathi" as the plaintiffs'. Injunction.

In *Hohner v. Gratz*,⁷ the plaintiff sold harmonicas in the United States, marked with his name. The defendant put harmonicas on the market, marked with his own name in small letters, and in large letters the words "Improved Hohner." Injunction and account.

Again, in *Investor Publishing Co. v. Dobinson*,⁸ the plaintiff published a paper called "United States Investor." The defendant, a corporation of the same name, began publication of a paper called "Investor," stated in its columns to be published by the Investor Publishing Co. Held a case for equitable relief.

In *Gouraud v. Trust*,⁹ the plaintiff, whose name was originally Trust, changed it to Gouraud, and established a business in toilet preparations. His sons, who had not changed their name, began to sell similar goods under the name of "Gouraud's Sons." Injunction.¹⁰

Among minor matters dealt with it has been held that an injunction would issue against the use by defendant of testimonials

¹ 3 Sandf. 725.

² 21 Cal. 448.

³ 28 How. Pr. 120.

⁴ Fed. Cas. 17963.

⁵ 61 N. Y. 226.

⁶ 40 L. T. N. S. 307.

⁷ 52 Fed. Rep. 871.

⁸ 72 Fed. Rep. 603.

⁹ 3 Hun, 627.

¹⁰ See *England v. N. Y. Pub. Co.*, 8 Daly, 375.

given to plaintiff,¹ against statements as to former employment made in such a way as to produce deception,² against a false representation that defendant was plaintiff's agent,³ against a false representation that plaintiff was defendant's agent,⁴ against a false representation as to date of establishing a business, calculated to represent a new business as the same business as an old established and still existing business,⁵ and against a representation by a manufacturer that his goods are the "original" at the suit of the first manufacturer of the goods.⁶ It is also held to be immaterial that only careless or ignorant persons can be deceived by the acts complained of if fraud on defendant's part be found.⁷

GOOD WILL.

The assets of a going business consist of the land which it may own, its leases, stock in trade, credits, and, lastly, an intangible something called Good Will.

The learned reader will doubtless judicially notice the fact that this good will may well be, and very often is in fact, the principal asset of the business, an obvious example being a successful newspaper or patent medicine business. That good will is a thing of value, and a subject of property, was very early recognized,⁸ and it is now well settled. "The good will of a trade is a subject of value and price. It may be sold, bequeathed, or become assets in the hands of the personal representative of the trader." Per Tindal, C. J., in *Hitchcock v. Coker*.⁹

Included in and making up the good will, and passing with it upon a sale of the business, is the business name,¹⁰ the trade marks,¹¹ the trade names,¹² and the trade secrets¹³ of the business;

¹ *Franks v. Weaver*, 10 Beav. 297.

² *Scott v. Scott*, 16 L. T. N. S. 143.

³ *Howe v. McKernan*, 30 Beav. 547.

⁴ *Coleman v. Flavel*, 40 Fed. Rep. 854.

⁵ *Fullwood v. Fullwood*, 9 Ch. D. 176.

⁶ *Cox v. Chandler*, L. R. 11 Eq. 446; *Lazenby v. White*, 41 L. J. Ch. 354.

⁷ *Von Mumm v. Frash*, 56 Fed. Rep. 830; *Enoch Morgan's Sons v. Wendover*, 43 Fed. Rep. 420; *Brooklyn White Lead Co. v. Masury*, 25 Barb. 416; *Hennessy v. White*, 6 W. W. & A'B. Eq. 216; *Wolfe v. Hart*, 4 Vict. L. R. Eq. 134.

⁸ *Giblett v. Read*, 9 Mod. 459.

⁹ 6 Ad. & E. 438.

¹⁰ *Levy v. Walker*, 10 Ch. D. 436.

¹¹ *Shipwright v. Clements*, 19 W. R. 599.

¹² *Banks v. Gibson*, 34 Beav. 566.

¹³ *James v. James*, L. R. 13 Eq. 421.

and covenants¹ and testimonials given to the business.² And as the good will itself is property, the parts of which it is made up are, separately considered, property.³

The notion of property in good will, and the constituent parts of good will, is of the highest importance, as upon it from the first the jurisdiction of equity has been solely based, and from this idea has flowed the fundamental rule that to recover the plaintiff must show a right at the very least as against the defendant. The courts have proceeded upon the theory of protecting property where the legal remedy was inadequate or illusory, or irreparable damage possible. Protection of the public from deception has been more than once put forward as a ground for interference, but it is well settled that equity has no jurisdiction upon this ground.⁴ Deception of the public is material only as the test of infringement, and as bearing upon the question of damages.

In the *Emperor of Austria v. Day & Kossuth*,⁵ the defendants, without the authority of the plaintiff, who was the King of Hungary, issued notes purporting to be Hungarian notes. Injunction granted to restrain the defendants from issuing such notes on the ground of property in the plaintiff. Per Turner, L. J.: "I agree that the jurisdiction of this court in a case of this nature rests upon injury to property, actual or prospective, and that this court has no jurisdiction to prevent the commission of acts which are merely criminal, or merely illegal, and do not affect any rights of property."

In the *Leather Cloth Co. v. The American Leather Cloth Co.*,⁶ Lord Westbury, C., says: "The true principle therefore would seem to be, that the jurisdiction of the court in the protection given to trade marks rests upon property, and that the court interferes by injunction because that is the only mode by which property of this description can be effectually protected."

But it should be held in mind that property in matters such as we are considering differs of necessity, in many important particulars, from property in other subjects of ownership. A trade mark,

¹ *Showell v. Winkup*, 60 L. T. N. S. 389.

² *Franks v. Weaver*, 10 Beav. 297.

³ *McLean v. Fleming*, 96 U. S. 45; *Schneider v. Williams*, 44 N. J. Eq. 391; *Hovenden v. Lloyd*, 18 W. R. 1132; *Le Page Co. v. Russia Cement Co.*, (C. C. A.) 51 Fed. Rep. 941; *Oakes v. Tonsmiere*, 49 Fed. Rep. 447; *James v. James*, L. R. 13 Eq. 421.

⁴ *N. Y. Cement Co. v. Coplay Cement Co.*, 44 Fed. Rep. 247; *Levy v. Walker*, 10 Ch. D. 436; *Weston v. Ketchum*, 51 How. Pr. 455. See *Chadwick v. Covell*, 151 Mass. 190.

⁵ 3 DeG. F. & J. 217.

⁶ 4 DeG. J. & S. 137.

a business name, or a trade name, derives its value from the esteem in which it is held by the public, and to create this esteem, labor, money, and time, not to mention other nobler elements, must all be combined. "I take property, when used in this connection and sense, to be a means by which money or money's worth, in the shape of profit or otherwise, is created or obtained." Per Van Koughnet, Chancellor of Upper Canada, in *Walker v. Alley*.¹

If the cases, stated above, be examined, it will be found that the wrongful act of the defendant in any particular case was an attempt, upon the part of the defendant, to appropriate to himself the benefit of some one or another of the constituent parts that go to make up the good will of a business.

The omnibus case, though the parent case of all the "dressing up" cases, is distinct from them, and peculiar in this, that the general appearance of the omnibuses and their crews really represented the business of the plaintiff. The attack was upon the entire good will of the plaintiff's business. The "dressing up" cases on the other hand are, as will be hereafter explained, in reality trade mark cases. The attack upon the good will in the "dressing up" cases, then, is an attack upon a trade mark.

The same is true in the "substitution" cases,² the inferior quality of the goods lessening confidence in the trade mark; a secondary effect being that the defendant is enabled to appropriate in part the plaintiff's market by the confidence which the use of the trade mark inspires.

In *Carlsbad v. Tibbets*,³ *Merriam v. Texas Siftings Co.*,⁴ and *Orr, Ewing & Co. v. Johnson*,⁵ the attempt was made to appropriate the benefit of the trade name, and in *Howard v. Henriques*⁶ the appropriation attempted was of a local trade name.

The other cases illustrate attempts more or less direct to appropriate the benefit of an established business name.

"DRESSING UP."

In all the "dressing up" cases cited above, the defendant "accumulated resemblances." The plaintiff's right was not rested upon any one thing. It did not consist in shape alone, nor in color

¹ 13 Grant Up. Can. Ch. 366.

² *Hennessy v. Hogan*, 6 W. W. & A'B. Eq. 216; *Hostetter v. Bruëggemann Co.*, 46 Fed. Rep. 188.

³ 51 Fed. Rep. 852.

⁵ 40 L. T. N. s. 307.

⁴ 41 Fed. Rep. 944.

⁶ 3 Sandf. 725.

alone, nor in any other particular alone. It consisted in a combination of several particulars,¹ the accumulation of which was evidence in itself of a desire upon the part of the defendant to cause his goods to look like the goods of the plaintiff, — a desire which could not obviously have any honest basis, nor could such accumulation be of necessity.²

Cases arose, however, in which the plaintiff rested his right upon one particular alone, or, at any rate, in which that view was taken by the court. For example, the plaintiff claimed the exclusive right to a barrel of peculiar shape and capacity,³ to the color of a label,⁴ to the color of a capsule,⁵ and to the color of the paper in which his goods were wrapped,⁶ and in these cases the limitation of the "dressing up" doctrine has been laid down; namely, that to gain protection the plaintiff's package must be sufficiently distinct from that which is of common right.⁷ And this is obviously a just limitation. For while a package of many particulars is equally effective for the purposes of the plaintiff, it is practically no limitation upon the right of the public; but if a certain colored paper or the like may be appropriated by one manufacturer in packing his goods, a very small number of manufacturers may render it difficult or impossible for a new comer in the trade to pack his goods without infringing the wide rights of those already in the business.

In *Harrington v. Libby*,⁸ the plaintiff, a manufacturer of paper collars, was the first to put them up in a tin pail. An injunction to restrain the defendant from selling his paper collars in tin pails was refused, on the ground that the plaintiff could not appropriate to himself for a particular use a package already in common use for other purposes.

The recent development of the law has, however, modified these limiting cases, and has created a conflict which it will require further decision to set at rest. In *Von Mumm v. Frash*,⁹ an injunction was granted against the use of a rose colored capsule;

¹ *Lever v. Goodwin*, 36 Ch. D. 1.

² *Taylor v. Taylor*, 2 Eq. Rep. 290; s. c. 23 L. J. Ch. 255.

³ *Moorman v. Hoge*, Fed. Cas. 9783.

⁴ *Fleischman v. Starky*, 25 Fed. Rep. 127.

⁵ *Mumm v. Kirk*, 40 Fed. Rep. 589.

⁶ *N. K. Fairbank Co. v. R. W. Bell Mfg. Co.*, 71 Fed. Rep. 295.

⁷ See *Stachelberg v. Ponce*, 128 U. S. 686; 9 Sup. Ct. Rep. 200; *Cady v. Schultz*, 32 Atl. Rep. 915 (R. I.); *Evans v. Von Laer*, 32 Fed. Rep. 153.

⁸ 12 Pat. Off. Gaz. 188.

⁹ 56 Fed. Rep. 830.

and in *Hildreth v. McDonald*,¹ against printing in red ink upon a package, every feature of which was common to the trade except the color of the ink used in the printing. In *Cook v. Ross*,² the plaintiff was held to have an exclusive right in a bottle of peculiar shape. Upon the strength of these cases it may be said that an exclusive right may be acquired in matters which have heretofore been held to be of common right, and not capable of exclusive appropriation; — a conclusion which is against the reasoning and decision of the limiting cases just cited, and also against the analogy of those trade mark cases which deny a right to appropriate a descriptive word.

Before leaving these “dressing up” cases, for the time being, it should be noted that they are in reality trade mark cases of a rather refined sort, too late upon the scene to obtain admittance where they belong,³ for it is impossible to draw any distinction of principle between an unregistered trade mark, which indicates the origin of the article to which it is applied, and the “dress” of an article, which equally and in the same way serves to indicate origin. Whatever distinction there may be, it cannot be said to be of much practical importance, when it is considered that the test of infringement of a trade mark is the probability of deception, while in the “dressing up” cases, if there is probability of deception, relief will be granted.

The connection between trade mark cases and the “dressing up” and “substitution” cases is obviously closer than that between those cases and the other unfair competition cases relating to business names, trade names, and trade secrets, the common link binding all these branches being the good will of which each branch is a part. In every unfair competition case the defendant’s attempt is to appropriate to himself some part of the good will, or the entire good will, of the plaintiff’s business. It will be obvious, therefore, that any given rule of law applicable in trade mark cases, so far as it arises out of the nature of trade marks as a part of good will, is equally applicable to the other parts of good will, not by analogy, but because the cases are for the purpose of that particular rule identical. In cases, however, where the rule does not arise out of the nature of good will property, but is applied upon general reasons of policy, any branch of the law may with propriety be resorted to in the search for analogies.

¹ 164 Mass. 16.

² *Morgan v. Troxell*, 23 Hun, 632; S. C. 11 Reporter, 241.

³ 73 Fed. Rep. 203.

To the "dressing up" cases, whether they be regarded as in reality identical with cases in which an unregistered trade mark is the base of the plaintiff's right, or merely as closely related cases, obviously the general rules applicable to trade marks may be applied, including the fundamental one that actual user by the plaintiff is necessary to establish a right, and the rules governing the length of user necessary to establish a right. These rules arise out of the nature of the right, which is established only by knowledge on the part of the public, and obviously such knowledge cannot be created without user, and cannot exist apart from user; and this rule is applicable and applied in other good will cases, as, for instance, cases of business name¹ and trade name.²

Another fundamental rule of the trade mark law is, that merely descriptive words cannot be exclusively appropriated. This is obviously a rule of policy, its reason being that the use of descriptive words for descriptive purposes is a matter of common right to all men, and the strictness with which the rule is applied may be accounted for by considering the fact that an arbitrary word, while hardly trenching at all upon common right, affords equal protection to the user. The application by analogy of this rule may be traced in those "dressing up" cases which deny a plaintiff's right to appropriate form or color, without other particulars, as distinctive of the origin of his goods.

"SUBSTITUTION."

The "substitution" cases obviously bear a very close relationship to the "dressing up" cases, being but the converse of those cases. The re-use of genuine packages to contain spurious goods is very commonly attempted, and whether fraudulently practised or not it will be enjoined,³ and if the re-use is with fraudulent intent an account will also be given.⁴ An injunction will also be awarded against the sale of goods genuine, but of inferior quality, in a package, or with labels designed to imitate the package, in which the plaintiff markets his better goods;⁵ and the vigor of the courts in the suppression of substitution has been pushed to the extent of

¹ *Beazley v. Soares*, 22 Ch. D. 660.

² *Maxwell v. Hogg*, L. R. 2 Ch. 307.

³ *Barnett v. Leuchars*, 13 L. T. N. S. 495; *Hennessy v. Cooper, Sebast. Trade Mark Cases*, 549; *Evans v. Von Laer*, 32 Fed. Rep. 153.

⁴ *Stonebreaker v. Stonebreaker*, 33 Md. 252; *Cartier v. Carlile*, 31 Beav. 292.

⁵ *Hennessy v. White*, 6 W. W. & A'B. Eq. 216; *Hennessy v. Hogan*, 6 W. W. & A'B. Eq. 225; *Gillott v. Kettle*, 3 Duer, 624.

enjoining the unexplained sale of other goods to a customer calling for plaintiff's article, there being no infringement of any trade mark, "dress," or label.¹

BUSINESS NAMES.

A business name is that name under which a business is carried on, whatever it may be, whether a personal name, as is commonly the case, or not.

There is no exclusive right in a name, merely as a name,² protection being given, as in trade mark and "dressing up" cases, only after a right has been established by actual user in business;³ but when so used, the owner will be protected in the exclusive use of his business name.⁴ It has been heretofore held that a medical man,⁵ or an artist,⁶ had not such a business interest in his name as to entitle him to protection; but in the case of a medical man, at any rate, the strong dissent since expressed by eminent judges from the decision in *Clark v. Freeman*,⁷ and the peculiar facts of *Olin v. Bate*,⁸ make it seem probable that when the point again arises the rule now apparently established may not be applied.

While a business name is property, passing to the personal representative,⁹ a distinction, growing out of the nature of the property, is made against an assignee in bankruptcy, who does not take an exclusive right as against the bankrupt.⁹ The right to a business name is very greatly qualified however, by the right of others of the same name to use it;¹⁰ but others of the same name must exercise their right in such a way as not to lead to confu-

¹ *Enoch Morgan's Sons v. Wendover*, 43 Fed. Rep. 420; *American Fibre Chamois Co. v. De Lee*, 67 Fed. Rep. 329.

² *Du Bulay v. Du Bulay*, L. R. 2 P. C. 430; *Phelan v. Collender*, 6 Hun, 244; *Hallett v. Cumston*, 110 Mass. 29.

³ *Beazley v. Soares*, 22 Ch. D. 660; *Lawson v. Bank of London*, 18 C. B. 84.

⁴ *Hohner v. Gratz*, 52 Fed. Rep. 871; *Burke v. Cassin*, 45 Cal. 467.

⁵ *Clark v. Freeman*, 11 Beav. 112; *Olin v. Bate*, 98 Ill. 53.

⁶ *Martin v. Wright*, 6 Sim. 297.

⁷ *Per Cairns, L. J.*, in *Maxwell v. Hogg*, L. R. 2 Ch. 307; *Malins, V. C.*, in *Springhead Spring Co. v. Riley*, L. R. 6 Eq. 561; *Lord Selborne, C.*, in *In re Riviera*, 26 Ch. D. 48; *Kay, J.*, in *Williams v. Hodge & Co.* 84 L. T. (Journal), 134.

⁸ *Burke v. Cassin*, 45 Cal. 467.

⁹ *Helmboldt v. H. T. Helmboldt Mfg. Co.*, 53 How. Pr. 453.

¹⁰ *Dence v. Mason*, W. N. 1877, p. 23, 1878, p. 42; *Hallett v. Cumston*, 110 Mass. 29; *McLean v. Fleming*, 96 U. S. 245; *Massam v. Thorley Food Co.*, 6 Ch. D. 574; *Prince Met. Paint Co. v. Carbon Met. Paint Co.*, Codd. Dig. 209; *Meneely v. Meneely*, 62 N. Y. 427; *De Long v. De Long*, 39 N. Y. Supp. 903; 7 App. Div. 33; *American Cereal Co. v. Eli Pettijohn Cereal Co.*, 72 Fed. Rep. 903.

sion.¹ In *Johann Hoff v. Tarrant & Co.*,² the plaintiff had sold "Hoff's Malt Extract" largely in the United States. The defendant began to import and sell malt extract made by Leopold Hoff. Held, that his labels must be "Leopold Hoff's Malt Extract," and not simply "Hoff's Malt Extract."

If the right to the fair use of a business name may be qualified by the prior use by another person of the same name,³ obviously a use with fraudulent intent will be restrained,⁴ and where the user is not of that name it is a badge of fraud;⁵ but in all these cases except the last mentioned the burden is upon the plaintiff clearly to make out a fraudulent intent.⁶

A name adopted by a corporation stands in the same category as one adopted by an individual,⁷ and if it tends to create confusion by its similarity to one already in use its use will be enjoined;⁸ and even when it is adopted in good faith and is the name of an officer of the company.⁹ But this rule against adopted corporate names does not, for obvious reasons, apply when the plaintiff's name is descriptive.¹⁰ Furthermore, a merely colorable right to a business name will be disregarded, and its use enjoined;¹¹ for example, a

¹ *Turton v. Turton*, 42 Ch. D. 128; *McLean v. Fleming*, 96 U. S. 245; *Johann Hoff v. Tarrant & Co.*, 71 Fed. Rep. 163; *Chas. S. Higgins Co. v. Higgins Soap Co.*, 144 N. Y. 462; *contra*, *De Long v. De Long Co.*, 39 N. Y. Supp. 903; 7 App. Div. 33.

² 71 Fed. Rep. 163.

³ *Johann Hoff v. Tarrant & Co.*, 71 Fed. Rep. 163.

⁴ *Taylor v. Taylor*, 2 Eq. Rep. 290; *Clark v. Clark*, 25 Barb. 76; *Stonebreaker v. Stonebreaker*, 33 Md. 252; *Holmes, Booth, & Haydens v. The Holmes, Booth, & Atwood Mfg. Co.*, 37 Conn. 278; *Landreth v. Landreth*, 22 Fed. Rep. 41; *Brown Chem. Co. v. F. Stearnes & Co.*, 67 Fed. Rep. 360; *Clark Thread Co. v. Armitage*, 67 Fed. Rep. 886.

⁵ *Goodyear v. Day*, 22 Fed. Rep. 44; *De Youngs v. Jung*, 27 N. Y. Supp. 370.

⁶ *Turton v. Turton*, 42 Ch. D. 128; *Rogers v. Rogers*, 11 Fed. Rep. 495; *Iowa Seed Co. v. Dorr*, 70 Iowa, 481; *Rogers v. Simpson*, 54 Conn. 527; *Brown Chem. Co. v. Meyer*, 31 Fed. Rep. 453; 139 U. S. 540.

⁷ *Goodyear v. Day*, 22 Fed. Rep. 644.

⁸ *Clark Thread Co. v. Armitage*, 67 Fed. Rep. 896; (*C. C. A.*) 74 Fed. Rep. 936; *Wm. Rogers Mfg. Co. v. R. W. Rogers Co.*, 66 Fed. Rep. 56; *Wm. Rogers Mfg. Co. v. Rogers & S. Mfg. Co.*, 11 Fed. Rep. 495; *Horton Mfg. Co. v. Horton Mfg. Co.*, 17 Reporter, 261; *De Long v. De Long Co.*, 89 Hun, 399; *Van Auken Co. v. Van Auken Co.*, 57 Ill. App. 240; *Hendricks v. Montagu*, 17 Ch. D. 638; *Nat. Folding Box & Paper Co. v. Nat. Folding Box Co.*, 13 Reports, 60.

⁹ *Chas. S. Higgins Co. v. Higgins Soap Co.*, 144 N. Y. 462.

¹⁰ *Australian Co. v. Australian Museum Co.*, W. N. 1880, p. 6; *Goodyear Co. v. Goodyear Co.*, 128 U. S. 598; *India & China Tea Co. v. Teede*, W. N. 1871, p. 241.

¹¹ *Meriden Britannia Co. v. Parker*, 39 Conn. 450; *Southorn v. Reynolds*, 12 L. T. N. s. 75; *Croft v. Day*, 7 Beav. 84.

written permission from one of plaintiff's name to the defendant does not justify its use, the licensor having no actual interest.¹

The exclusive right to use a descriptive phrase as a business name may perhaps be acquired by long user; as, for example, the right by a maker of taper sleeve pulleys to call his establishment "Taper Sleeve Pulley Works";² or by a coal dealer selling coal at a guinea a ton to call his business "The Guinea Coal Co.";³ or by a clothier to call his store "Mechanic's Store."⁴ The owner of a name may also lose his rights in it by allowing another to use it as a business name.⁵ The right to use a name may be given by assignment, and the right given may be qualified by a condition; but a purchaser without notice will take the right to use the name free of the condition, and so of a purchaser with notice from the innocent vendee.⁶ An exception to the general rule as to the assignability of business names may exist upon grounds of public policy, in the case where the name has acquired a special significance indicative of personal skill or attention,⁷ and contracts whereby one parts with the right to use his own name in a certain trade will in general be jealously viewed by the courts, and not extended beyond their plain terms.⁸ The right to a business name need not be exclusive. It is sufficient if the plaintiff has a right in common with others, while the defendant has no right.⁹

TRADE NAMES.

We have seen that a business name is that name, whatever it may be, by which a going business is known, and which in a way concentrates in itself all the good will the public has for the business. It is obviously a thing of very great value. A trade name has many points of resemblance to a business name, but it is,

¹ *Wolfe v. Barnett*, 24 La. Ann. 97; s. c. 13 Am. Rep. 111; *Shrimpton v. Laight*, 18 Beav. 164. But see *Hallett v. Cumston*, 110 Mass. 29; and conf. Mass. Pub. Stat., ch. 76, § 6.

² *Gray v. Taper Sleeve Pulley Works*, 16 Fed. Rep. 436.

³ *Lea v. Haley*, L. R. 5 Ch. 161.

⁴ *Weinstock v. Marks*, 108 Cal. 529. See also *Milner v. Reed*, Bryce on T. M. 90; *Maller v. Davis*, 3 *The Times* L. R. 221.

⁵ *Birmingham Brewery Co. v. Liverpool Vinegar Co.*, W. N. 1888, p. 139; *Marquis of Londonderry v. Russell*, 3 *The Times* L. R. 360.

⁶ *Oakes v. Tonsmiciere*, 49 Fed. Rep. 447.

⁷ *Mayer v. Flanagan*, 34 S. W. Rep. 785 (Texas).

⁸ *Chat. Med. Co. v. Thetford*, 58 Fed. Rep. 347.

⁹ *Southorn v. Reynolds*, 12 L. T. N. s. 75; *Clark v. Armitage*, (C. C. A.) 74 Fed. Rep. 936.

generally speaking, a narrower thing than a business name, standing usually for some one article dealt in by the business. Every one is familiar with that variety of trade name, hardly distinguishable in its business importance and value from a business name, which is exemplified in the name of a house, either of entertainment, of manufacture, or of trade.

The weight of authority in this country is to the effect that such a trade name does not become attached to the building. Whether in a particular case it does become attached or not is probably a question of fact. In *Woodward v. Lazar*,¹ *Wood v. Sands*,² and *Mossup v. Mason*,³ it was held in regard to hotel names that the name had not become attached to the house.⁴ In *Booth v. Jarrett*⁵ it was held that the plaintiff's name had become attached to a theatre, and in *Pepper v. Labrot*⁶ that the plaintiff could not restrain the use of his name by the purchaser of his distillery from his assignee in bankruptcy, while in *De Witt v. Mathey*⁷ it was held that the name "The Saratoga," used and advertised by the plaintiff and his predecessors for thirty-five years as the name of a saloon, was not local, and that the plaintiff was entitled to protection in its use on his removal to a new location.

Apart from this question of locality, such names will always upon a proper showing receive protection.⁸ Actual use in business is essential to the creation of a right in such a trade name, for, as in the similar case of a personal name, there is no right to protection to the name of a house apart from business,⁹ nor can any exclusive right be acquired in a descriptive name, as, for example, "The Mammoth Wardrobe" for a clothier's shop.¹⁰ This latter proposition, however, in view of some recent cases, must be considered as still an open question. These cases will be noticed later.

There is still another class of trade names upon which questions arise more frequently than upon those just considered; namely, those names applied to goods, although not affixed to them, by which they acquire reputation in the market and by which they are known. Such names, for example, as "Two Elephant" yarn,¹¹

¹ 21 Cal. 448.

² Fed. Cas. 17963.

³ 18 Grant Up. Can. 453.

⁴ *Mason v. Queen*, 23 Scot. L. R. 646, *contra*.

⁵ 52 How. Pr. 169.

⁶ 8 Fed. Rep. 29.

⁷ 35 S. W. Rep. 1113 (Ky.).

⁸ *Howard v. Henriques*, 3 Sandf. 725.

⁹ *Day v. Brownrigg*, 10 Ch. D. 294.

¹⁰ *Gray v. Koch*, 2 Mich. N. P. 119.

¹¹ *Orr, Ewing & Co. v. Johnson & Co.*, 40 L. T. N. S. 307. But see *Lorillard v. Pride*, 28 Fed. Rep. 434.

"Cross" cotton,¹ "Bethesda" water,² "Lightning" hay knife,³ or "Extra Dry"⁴ Champagne, will be protected; but on familiar principles merely descriptive names, such as "Desiccated Codfish,"⁵ or "Cherry Pectoral,"⁶ will not be. But it seems that by long user an exclusive right in a descriptive trade name may be acquired,⁷ and that a descriptive trade name will be protected against the sale of inferior goods⁸ under the descriptive name.

Very hard cases have arisen where the article to which the name has been applied has been patented, as to the right of the public, not only to make the thing upon the expiration of the patent, but also to call it by a particular name. As a general proposition, it may be laid down that the fact that a patent has been taken upon an article does not affect the rules of law which govern the decision when the question arises whether the patentee's name for the article is entitled to protection. The question in all cases, both when the article has been patented and when it has not, is simply one of fact: Has the name become descriptive? It may become descriptive in either of two ways; first, because it has come to indicate a new principle of construction, as was held in the cases in the note,⁹ where the name was applied to a new machine; or second, because the article named is a new product, upon which the first producer has bestowed a name which has become identified with the product.¹⁰ If it is found as a fact that the name has become descriptive for either of the

¹ *Cartier v. Westhead*, Sebast. Trade Mark Cases, 199 (1861).

² *Dunbar v. Glenn*, 42 Wis. 118; *The Congress Spring Co. v. The High Rock Spring Co.*, 57 Barb. 526.

³ *Hiram Holt Co. v. Wadsworth*, 41 Fed. Rep. 34.

⁴ *Von Mumm v. Frash*, 56 Fed. Rep. 830.

⁵ *Town v. Stetson*, 5 Abb. Pr. N. S. 218.

⁶ *Ayer v. Rushton*, Codd. Dig. 221.

⁷ *New Home S. M. Co. v. Bloomingdale*, 59 Fed. Rep. 284; *Powell v. Birmingham Brewery Co.*, [1894] 3 Ch. 449; *Bennett v. McKinley*, (C. C. A.) 65 Fed. Rep. 805; *Jaros Hygienic Co. v. Fleece Hygienic Co.*, 65 Fed. Rep. 424. See *Social Register Assoc. v. Howard*, 60 Fed. Rep. 270.

⁸ *Dr. Jaeger's Sanitary System Co. v. Le Boutillier*, 24 N. Y. Supp. 890; *Carlsbad v. Tibbetts*, 51 Fed. Rep. 852.

⁹ *Fairbanks v. Jacobus*, 14 Blatch. 337; s. c. Fed. Cas. 4608; *Singer Mfg. Co. v. June Mfg. Co.*, 16 Sup. Ct. Rep. 1002; *Singer v. Loog*, 8 App. Cas. 376; *Gally v. Colts Mfg. Co.*, 30 Fed. Rep. 122; *Dover Stamping Co. v. Fellows*, 163 Mass. 191.

¹⁰ *The Tucker Mfg. Co. v. Boyington*, 9 Pat. Off. Gaz. 1875; *Cheavin v. Walker*, 5 Ch. D. 850; *Young v. Macrae*, 9 Jur. N. S. 322; *Linoleum Mfg. Co. v. Nairn*, 7 Ch. D. 834; *In re Consol. Fruit Jar Co.*, 14 Pat. Off. Gaz. 269; *Leibig v. Hanbury*, 17 L. T. N. S. 298; *Leclanche Battery Co. v. West. Elec. Co.*, 21 Fed. Rep. 538; *St. Louis Stamping Co. v. Piper*, 33 N. Y. Supp. 443.

above reasons, then it is free to the public, as well before as after the expiration of the patent upon the thing.¹

The argument in support of allowing public appropriation of a trade name to operate to divest the owner's right is, that to protect such a name would practically prolong the monopoly of the patent. To which the obvious answer may be made, that it is not true, for the right to make the thing and the right to represent it as made according to the expired patent, being free, the only advantage that the patentee would have over his competitors would be that arising out of the good will created by the excellence and reliability of his wares,² and the further advantage that under *Morgan v. Wendover*,³ dealers could not substitute the new make of goods without explanation.⁴

That the question of descriptiveness is one of fact will appear from a comparison of *Singer v. Kimball & Morton*⁵ with the *Singer* cases already cited, for, while in the latter cases the court found that the name had become indicative of a principle of construction and therefore descriptive, and refused protection, in the former case the court found that the name was indicative of origin, and granted an injunction. The distinction is to be observed, that, when an article to which a trade name is given is a mere improvement upon existing things, the name given to it by the first producer will not become descriptive.⁶

It is usually laid down as a general proposition, that no exclusive right can be acquired in a geographical name as a trade name,⁷

¹ *Young v. Macrae*, 9 Jur. N. S. 322.

² *Edelsten v. Vick*, 11 Hare, 78; S. C. 1 Eq. Rep. 413.

³ 43 Fed. Rep. 420.

⁴ See *Celluloid Mfg. Co. v. Cellonite Mfg. Co.*, 32 Fed. Rep. 94, in which it is said (per Mr. Justice Bradley), that a right to use a name as a trade mark might coexist with a right in the public by appropriation to use it as a trade name, and consequently that competitors might use the name for advertising purposes though forbidden to affix it to the goods. See also *Gray v. Taper Sleeve Pulley Works*, 16 Fed. Rep. 436, in which it was held that a right to use a descriptive phrase as a business name might coexist with a right in the public to use the phrase as a trade name, and *Gebbie v. Stitt*, 82 Hun, 93, in which the defendant had appropriated a geographical business name and trade mark, and in which an injunction only against the use of the geographical name as a trade mark was granted.

⁵ 10 Scot. L. R. 173.

⁶ *Barlow & Jones, Ltd. v. Johnson & Co.*, 34 Sol. Journ. 298; Ct. of App., W. N. 1890, p. 110; *Hiram Holt Co. v. Wadsworth*, 41 Fed. Rep. 34.

⁷ *Canal Co. v. Clark*, 13 Wall. 311; *Glendon Iron Co. v. Uhler*, 75 Pa. St. 467; *N. Y. Cement Co. v. Coplay Cement Co.*, 45 Fed. Rep. 212; *Genesee Salt Co. v. Burnap*, 67 Fed. Rep. 534; *Bulloch v. Gray*, 19 Journ. of Juris. 218; *Candee, Swan & Co. v. Deere & Co.*, 54 Ill. 439.

upon the ground of its descriptiveness. But this rule against geographical trade names has so many exceptions as almost to have reached the vanishing point. For example, where the plaintiff controls the product of an article which is called by the name of the place where it is produced, his use of the geographical name will be protected; while as against a person using a geographical¹ name upon goods actually made elsewhere, protection will be given to one who can truthfully use the geographical trade name, whether he is the only person who can truthfully use it or not.²

In *N. Y. Cement Co. v. Coplay Co.*,³ the plaintiff made cement at Rosendale, and cement bearing that name was understood by the public to be made at Rosendale. It did not appear that there were not many makers of cement at Rosendale. Defendant made cement in another State and sold it as "Rosendale" cement. Held, no relief unless it could be shown that the plaintiff had an exclusive ownership or property in the name Rosendale. Per Mr. Justice Bradley: "Would not the allowance of such an action be carrying the doctrine of liability for unfair competition too far? . . . It seems to us that this would open a Pandora's box of vexatious litigation. . . . Unless there is an invasion of some trade mark or trade name, or peculiarity of style in which some person has a right of property, the only persons legally entitled to judicial redress would seem to be those who are imposed upon by such pretences."

New York Cement Co. v. Coplay Cement Co. decides that, to entitle the plaintiff to protection in such cases as those now under consideration, his right to use the geographical trade name must be exclusive. In this, however, the case stands alone against the decisions of all other United States courts in which the question has arisen,⁴ against the decisions of those State courts in which the question has arisen, and against the decisions of United States courts in analogous cases. It is opposed also to the evident leaning of a Circuit Court of Appeals,⁵ and in *Carlsbad v. Tibbetts*⁶ the court indulges in a pointed criticism of the case.

¹ *Carlsbad v. W. T. Thackeray & Co.*, 57 Fed. Rep. 18; *La République Française v. Schultz*, 57 Fed. Rep. 37.

² *Newman v. Alvord*, 51 N. Y. 189; *Lea v. Wolff*, 13 Abb. Pr. n. s. 389; *Blackwell v. Dibrell*, 3 Hughes, 151; *Braham v. Beachim*, 7 Ch. D. 548; *Association v. Piza*, 24 Fed. Rep. 125; *Southern White Lead Co. v. Cary*, 25 Fed. Rep. 125; *Southern White Lead Co. v. Coit*, 39 Fed. Rep. 492. *Contra*, *N. Y. Cement Co. v. Coplay Cement Co.*, 44 Fed. Rep. 277.

³ 44 Fed. Rep. 277.

⁴ See Note 2, above.

⁵ *Scheur v. Muller*, 51 Fed. Rep. 852.

⁶ 74 Fed. Rep. 225.

That an exclusive right in plaintiff is not essential was held in an analogous case in a Circuit Court in *Carson v. Ury*,¹ where an injunction was granted at the suit of a member of a Labor Union against a printer who sold imitation Union labels, the bill alleging that the public and the plaintiff were defrauded and the plaintiff injured in his business.² The owner of a business name, too, is protected against others not of that name,³ and may even acquire a right by user against those of the same name, compelling the second user to distinguish himself.⁴ It will be observed that the line of cases of which *Association v. Piza* is one⁵ give protection without regard to exclusive right in the plaintiff, as against one who cannot use the geographical name truthfully.

That a right may be acquired by user, in a geographical trade name, as against those who can use it with as much truth as the plaintiff, appears to be the doctrine of a line of English cases.

In *Wotherspoon v. Currie*,⁶ the plaintiffs were makers of starch, at first at Glenfield, and afterwards at *another place*, and their starch was known as the "Glenfield" starch. The defendant began to make starch at Glenfield, and sold it in packages upon which that word was printed in large letters, together with defendant's name. Injunction granted to restrain the defendant from using the word "Glenfield" in connection with his starch.

In *Thompson v. Montgomery*⁷ plaintiffs and their predecessors for one hundred years had made ale at Stone, and their ale was widely known as "Stone" ale, which name had been refused registration as a trade mark. They were the only brewers at Stone until the defendant commenced to brew ale there, and sell it as "Stone" ale, and also to imitate the plaintiff's labels. Injunction restraining the defendant from using the words "Stone Ale."⁸

In these cases the decision is rested upon the ground of fraud, and it is freely admitted that the plaintiff can have no property in the descriptive word. It is difficult to see, if the plaintiff is denied a right in the descriptive word upon the ground that others have

¹ 39 Fed. Rep. 777.

² *People v. Fisher*, 50 Hun, 552; *Perkins v. Heert*, 39 N. Y. Supp. 223; 5 App. Div. 335, *accord*. *Schneider v. Williams*, 44 N. J. Eq. 391; *Cigar Makers' Union v. Companni*, 40 Minn. 243; *Weener v. Brayton*, 152 Mass. 101, *contra*.

³ *Hohner v. Gratz*, 52 Fed. Rep. 871.

⁴ *Johann Hoff v. Tarrant & Co.*, 71 Fed. Rep. 163.

⁵ Note 2, page 292.

⁶ L. R. 5 H. L. 508.

⁷ *Thompson v. Montgomery*, 41 Ch. D. 35.

⁸ *Powell v. Birmingham Brewery Co.*, [1894] 3 Ch. 449, *accord*.

an equal right to it, why it is fraudulent in one of these others to exercise his right, and why the plaintiff has not himself to blame if he suffers harm thereby, inasmuch as with him it lay at the outset to select a non-descriptive word as his trade name. It seems an undefined jurisdiction for courts to enter upon, and either the public must submit to the first appropriation of a descriptive trade name, or use the descriptive name for descriptive purposes at the peril of being branded as fraudulent. If the cases be read as showing that under certain circumstances a right to a descriptive word may be acquired by user, the public has no means of knowing, without experiment, what will be held to be a sufficient user to give an exclusive right, and individuals must determine this at their peril. In this country, with the exception of the case of *Gebbie v. Stitt*,¹ mentioned below, the courts have gone no further in protecting geographical trade names than to give protection as against a defendant who could not truthfully use it.²

The doctrine of *Wotherspoon v. Currie*, *Thompson v. Montgomery*, and *Powell v. Birmingham Brewery Co.*, was repudiated in *Elgin Butter Co. v. Sands*,³ and the recent case of *Reddaway v. Banham*⁴ seems to indicate that a reaction may be looked for against the abandonment of the safe ground of a property right in plaintiff as a basis of relief. In *Reddaway v. Banham*,⁴ the plaintiff had made belts of camel's hair for many years, and had sold them under that name. The defendant began to make belts of camel's hair, and to sell them under that name. Held, that the defendant was entitled to call his goods by a name which was merely a substantially correct description of them, although, by reason of the plaintiff having for many years sold similar goods under the same name, purchasers might be thereby misled into the belief that they were buying the goods of the plaintiff.⁵

Wotherspoon v. Currie and *Thompson v. Montgomery* show the extreme limit reached in geographical trade name cases, while *Gebbie v. Stitt*⁶ represents the extreme to which a court in this country has gone in such a case. There, upon facts almost identical with those of *Wotherspoon v. Currie*, except that there was evidence of fraudulent intention beyond that afforded by the mere

¹ 82 Hun, 93.

² 155 Ill. 127.

³ Note 2, page 292.

⁴ [1895] 1 Q. B. 286.

⁵ See *De Long v. De Long*, 39 N. Y. Supp. 903; 7 App. Div. 33; *Coats v. Merrick Thread Co.*, 36 Fed. Rep. 324; 149 U. S. 562; *Lorillard v. Pride*, 28 Fed. Rep. 434.

⁶ 82 Hun, 93.

fact of setting up business and using the geographical trade name, which was not the case in *Wotherspoon v. Currie*, an injunction was granted, limited to the use of the trade name as a trade mark. *Orr, Ewing & Co. v. Johnson*¹ is also a very extreme case, the defendant being enjoined from using a label every feature of which was common to the trade, as was the case of the label used by the plaintiff, because ultimate purchasers in India had given the plaintiff's goods a trade name derived from a representation of two elephants which formed part of plaintiff's ticket, and the court thought it likely that defendant's goods, the ticket of which also had two elephants as a feature, might perhaps derive some benefit from this fact. In *Lorillard v. Pride*,² upon similar facts, a different conclusion was reached in this country.

In business names, *Lea v. Haley*³ and *Gray v. Taper Sleeve Pulley Works*⁴ represent the extreme in England and the United States, in both cases a purely descriptive phrase being given protection as a business name.

In "dressing up" cases we have left our English cousins far behind. The extension of plaintiffs' rights at the expense of the public, and the abandonment of property in the plaintiff as a ground of action, is illustrated in *Hildreth v. McDonald*, *Von Mumm v. Frash*, and *Cook v. Ross*. In *Hildreth v. McDonald*⁵ and *Von Mumm v. Frash*⁶ protection was afforded to color alone as a distinctive mark, and in *Cook v. Ross*⁷ to shape alone. The old rule as shown in *Moorman v. Hoge*⁸ and *Mumm v. Kirk*,⁹ that color and shape alone could not be exclusively claimed seems to be passing away, and nothing is certain in "dressing up" cases but that a man cannot claim the exclusive right to do up his goods in brown paper,¹⁰ nor the exclusive right to put them up in a package well known and used for other purposes, a tin pail, to wit.¹¹

TRADE SECRETS.

The communication or use of a trade secret by one who is bound in good conscience not to use or communicate it will be restrained,¹²

¹ Stated on page 279.

⁴ 16 Fed. Rep. 436.

⁷ 73 Fed. Rep. 203.

² 28 Fed. Rep. 434.

⁵ 164 Mass. 16.

⁸ Fed. Cas. 9783.

³ L. R. 5 Ch. 155.

⁶ 56 Fed. Rep. 830.

⁹ 40 Fed. Rep. 589.

¹⁰ *N. K. Fairbank Co. v. R. W. Bell Mfg. Co.*, 71 Fed. Rep. 295.

¹¹ *Harrington v. Libby*, 14 Blatch. 128; s. c. Fed. Cas. 6107.

¹² *Peabody v. Norfolk*, 98 Mass. 452; *Merryweather v. Moore*, [1892] 2 Ch. 518; *Youatt v. Winyard*, 1 Jac. & W. 394; *Western v. Hemmons*, 2 Vict. L. R. Eq. 121; *Whitney v. Hickling*, 5 Grant Up. Can. Ch. 605.

and the equity will follow the secret into the hands of all who take with notice;¹ but when fairly discovered or taken without notice it is free.² Where one who has become acquainted with the secret stands by and allows another to purchase without disclosing his knowledge, he will be restrained from himself using it.³ In a case where one has received a secret in trust for others and himself, and has used it for his sole advantage, although a sale cannot be ordered, the court will order its value ascertained for the benefit of the *cestuis*.⁴

CONTRIBUTORY INFRINGEMENT.

The law of Unfair Competition recognizes an indirect infringement of a plaintiff's right by assisting or contributing to an infringement by others, as by advising dealers to refill genuine and distinctive bottles with spurious liquor,⁵ or furnishing an empty distinctive bottle and selling a liquor with which it may be refilled,⁶ or printing and selling labels sufficiently like plaintiff's label to cause confusion and fraud;⁷ and a wharfinger who has notice that goods warehoused with him bear a spurious brand, and that the injured party intends to apply for an injunction, is justified in refusing to deliver the goods to the owner pending the motion.⁸

The equitable doctrine, that the plaintiff must commend himself to the court in order successfully to invoke its aid, obtains in full force in Unfair Competition cases. For example, if the labels of plaintiff's package represent the contents as pure and unadulterated, contrary to the fact,⁹ if they assert a manifest falsehood and physiological impossibility,¹⁰ if they are designed to deceive the public into the belief that the contents are something that they in

¹ *Morrison v. Moat*, 21 L. J. Ch. 284.

² *Estcourt v. Estcourt Hop. Ess. Co.*, L. R. 10 Ch. 276.

³ *Portal v. Hine*, 4 *The Times* L. R. 330; *Peabody v. Norfolk*, 98 Mass. 452; *Salomon v. Hertz*, 40 N. J. Eq. 400.

⁴ *Green v. Folgan*, 1 S. & S. 398.

⁵ *Hostetter v. Brueggemann*, 46 Fed. Rep. 188.

⁶ *Hostetter v. Becker*, 73 Fed. Rep. 297.

⁷ *Colman v. Crump*, 70 N. Y. 573; *Carson v. Ury*, 39 Fed. Rep. 777.

⁸ *Hunt v. Maniere*, 34 L. J. Ch. 144.

⁹ *Krauss v. Jos. R. Peebles Sons Co.*, 58 Fed. Rep. 585.

¹⁰ *Kohler v. Beeshore*, (C. C. A.) 59 Fed. Rep. 572.

fact are not,¹ if essential facts are misstated,² or if the plaintiff's business is illegal,³ the court will not give its protection.

The relative rather than the absolute nature of the plaintiff's right in Unfair Competition and trade mark cases is emphasized by the prominence which the question of the defendant's intent as affecting the plaintiff's right assumes. So far as the plaintiff's right to an injunction is concerned, it is universally held that, the plaintiff showing a right, and an invasion of that right being proved, the defendant must be enjoined. And as the text of an invasion of a right in a trade mark, "dress" of goods, business name, or trade name case, is the same, namely, whether what the defendant does has caused or is likely to cause⁴ confusion or fraud, cases under all these heads are authority for this proposition.⁵ But it has been held that the absence of a fraudulent intention upon the defendant's part would prevent an inquiry as to damages,⁶ or even an account,⁷ while in *Cartier v. Carlisle*⁸ and *Dixon v. Fawcus*⁹ it was held that the intent was wholly immaterial upon the question of an account, and to the same effect are *Burgess v. Hills*¹⁰ and *Stonebraker v. Stonebraker*.¹¹ In *Southorn v. Reynolds*¹² both an account and an inquiry as to damages were given. When the infringement consists of the resale by a retailer of spurious goods marked in violation of plaintiff's rights, the retailer having no notice of the fact, *Romilly*,

¹ *Cal. Fig Syrup Co. v. Putnam*, (C. C. A.) 69 Fed. Rep. 740.

² *Manhattan Med. Co. v. Wood*, 108 U. S. 218.

³ *German Asso. v. Oldenberg Asso.*, 46 Ill. App. 281; *Portsmouth Brewing Co. v. Portsmouth Brewing Co.*, 30 Atl. Rep. 346 (N. H.); *Electric Co. v. Perry*, 75 Fed. Rep. 898.

⁴ *Hendricks v. Montague*, 17 Ch. D. 638; *Lever v. Goodwin*, 36 Ch. D. 1; *Orr, Ewing & Co. v. Johnson*, 40 L. T. N. S. 307; *Shaw v. Pilling*, 175 Pa. St. 78; *Wiest Co. v. Weeks Co.*, 7 Kulp, 505; *Listmann Co. v. Wm. Listmann Co.*, 88 Wis. 334; *Taendsticksfabriks v. Myers*, 139 N. Y. 364.

⁵ *Menendez v. Holt*, 128 U. S. 182; *McLean v. Fleming*, 96 U. S. 245; *The Amoskeag Co. v. Garner*, 4 Am. L. T. N. S. 176; *The Singer Mfg. Co. v. Wilson*, 3 App. Cas. 376; *Holmes, Booth & Haydens v. The Holmes, Booth & Atwood Mfg. Co.*, 37 Conn. 278; *Graham & Co. v. Ker, Dods & Co.*, 3 Beng. L. R. App. 4; *Barnett v. Leuchars*, 13 L. T. N. S. 495; *Clement v. Maddick*, 15 Giff. 98; *Hendricks v. Montague*, 17 Ch. D. 638; *Singer Mfg. Co. v. Loog*, 18 Ch. D. 417; *Bass v. Guggenheimer*, 69 Fed. Rep. 271; *Cuervo v. Landauer*, 63 Fed. Rep. 1003; *Chas. S. Higgins Co. v. Higgins Soap Co.*, 144 N. Y. 462.

⁶ *Weed v. Petersen*, 12 Abb. Pr. N. S. 178.

⁷ *Edelsten v. Edelsten*, 1 DeG. J. & S. 185.

⁸ 31 Beav. 292.

⁹ 3 E. & E. 537.

¹⁰ 26 Beav. 244.

¹¹ 33 Md. 252.

¹² 12 L. T. N. S. 75.

M. R., who decided *Cartier v. Carlisle*, drew a distinction and refused an account, and in *Ainsworth v. Walmsley*¹ under the same circumstances an injunction was refused.

The measure of profits upon an account or of damages in an action or upon an inquiry as to damages, is the profit made by the defendant upon all goods sold, or the profit which the plaintiff would have made if he had sold the same quantity of goods.² The court will not be astute in dividing profits for the benefit of a wrongdoer, nor place an undue burden upon the plaintiff in proving his damages. The right to an account may be lost by laches,³ but although the right to an account has been lost by delay, the right to damages will still subsist.⁴

Fraudulent intent alone, admitted by demurrer, has been held sufficient ground in the United States for an injunction *pendente lite*,⁵ while in England it has been held that the defendant's fraudulent intent was sufficient ground for a perpetual injunction.⁶ The courts of this country have yet to decide that a plaintiff can prevail, not upon the strength of his own title, but upon the state of his opponent's mind.

Oliver R. Mitchell.

¹ L. R. 1 Eq. 518.

² *Stonebraker v. Stonebraker*, 33 Md. 252; *Lever v. Goodwin*, 36 Ch. D. 1; *Graham v. Plate*, 40 Cal. 593; *Hostetter v. Vowinkle*, 1 Dill. 329; s. c. Fed. Cas. 6714; *Faber v. Hovey*, Codd. Dig. 79, 249.

³ *McLean v. Fleming*, 96 U. S. 45.

⁴ *Drummond v. Addison*, 52 Mo. App. 10.

⁵ *Enoch Morgan's Sons Co. v. Hunkell*, 10 Rep. 577; s. c. 6 Pat. Off. Gaz. 1092.

⁶ *Wotherspoon v. Currie*, L. R. 5 H. L. 508; *Thompson v. Montgomery*, 41 Ch. D. 42.

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PHILIP S. ABBOT. — To all who knew Philip Stanley Abbot, the November number of *Appalachia* will be full of interest. The circumstances under which he met his death are vividly described by Professor Fay, who was with him at the time. To this account are appended extracts from a letter written to the author of the article by Mr. Abbot's father. Professor Palmer contributes an appreciative and sympathetic obituary notice, which is followed by a very effective sonnet. The magazine is published by the Boston Appalachian Mountain Club, and is for sale by W. B. Clarke & Co., of 340 Washington Street.

TORRENS SYSTEM HELD UNCONSTITUTIONAL IN ILLINOIS. — In the case of *The People v. Chase*, reported in 29 *Chicago Legal News*, 93, the Supreme Court of Illinois has declared unconstitutional that feature of the Torrens system of title registration as adopted there, which provides for a registrar of titles whose duty it is to register titles, etc., after he is satisfied that an applicant's title is good. It is assumed for the purposes of the decision that the law gives all persons five years to assert claims in the courts. Nevertheless it is held that judicial functions are conferred upon the registrar because his decision is necessarily based on law and fact, and because, with the limitation of actions provided for, it affects rights. The State Constitution vests the judicial power exclusively in the courts therein provided for.

This is not a satisfactory decision. It is perfectly clear that no sharp line can be drawn between judicial and other functions. Cooley, *Const. Lim.*, 6th ed., 109. That the duties of an official require him to pass upon law and fact in a way that affects rights does not of itself make these duties judicial rather than ministerial. When a sheriff levies upon the goods of A as belonging to B, a judgment debtor, his decision that they are B's binds A after the statute of limitations has run quite as much as, on the hypothesis of the court, a registrar's decision binds all adverse claimants. The latter is not an adjudication in the constitutional sense,

because not a final settlement of the rights of parties before the tribunal. It is true that notice to those known to be interested is provided for, but there is no power to summon them to appear. The findings are open to collateral attack but no appeal lies from them. The object of this notice, therefore, is to lessen the hardship of a short period of limitation. The reasoning of the court amounts to saying that an act becomes judicial in its character when it is made the starting point for a statute of limitations.

The counsel for the State in this case, Messrs. Pence and Carpenter of Chicago, have favored the REVIEW with copies of their very able briefs. They have attacked many features of the voluminous statute. It is possible here to mention only a few of the points they have made. They contend that, on a fair construction of the act, no statute of limitations is provided for, at any rate as to the decisions of registrars on the transfer of land which has been brought under the act; and that, if a statute of limitations is provided for, it is not constitutional, not being connected with possession on the part of the person in whose favor it runs. The view taken by the court rendered it unnecessary to consider these doubtful and interesting points. If the petition for a rehearing is granted, the court may pass upon some of them.

A PROPOSED CHANGE IN THE METHODS OF LAW REPORTING. — The task of extracting the law from the enormous mass of judicial decisions annually reported in this country is so difficult, that hardly a month elapses without the publication of some plan for simplifying the matter. And never were discussions of the question more pertinent than at present, in the light of the fact that this year's Century Digest of American Cases will, according to Professor C. G. Tiedeman of the University Law School of New York, contain reference to over half a million cases. Professor Tiedeman's article on "The Doctrine of Stare Decisis" in the recently published report of the New York Bar Association, contains an interesting suggestion on this point. He proposes that the reports of decisions should in the future contain only a statement of the material facts of the case, and a concise statement of the ruling of the court on the questions of law involved. And he suggests the appointment of a commission composed of the ablest jurists of the State, who should be charged with the reduction of the existing law to the form of commentaries on the different branches, and who should, after the completion of this task, issue annuals in which the judgments of the court during the current year would be analytically explained in the light of their exposition of the existing law, and the modifications stated, if any, which the new case has made in the prior law. These commentaries, he adds, should not take on the rigid form of a code, but should be in the strictest sense commentaries only, intended to relieve the profession of "the titanic task of gleaning the law from a study of five hundred thousand cases," and from "the difficult effort to reconcile the conflicting opinions of the courts in innumerable cases in which the judgments, upon a proper analysis of the law, and apart from judicial opinions, can be shown to be in harmony."

Professor Tiedeman's scheme seems to be, in effect, to restrict the judges to the task of simply deciding the rights of the litigants in the particular cases before them without giving their reasons, and to leave to the commission the truly "titanic" task of summarizing the results in the light of existing law. One may doubt the practicability of such a scheme,

but that its effect would be to simplify the task of the practising lawyer to an extraordinary degree must be plain to the most sceptical. Whether or not it is possible of realization, a step in the right direction could certainly be taken by the material shortening of judicial opinions. That this, at least, is not out of the question, seems clear. That it is desirable must be patent to any one who turns from a volume of English reports of the early part of this century to any recent volume of State reports.

"PICKETING" — INJUNCTIONS AGAINST STRIKERS. — Most of the public, outside of the trades unions, have a sufficient prejudice against anything that could be called "picketing" to approve without hesitation the sweeping injunction issued by the Supreme Court of Massachusetts in the recent case of *Vegeahn v. Gunter*, 44 N. E. Rep. 1077. And at the first reading the majority opinion seems to show sufficient grounds for the injunction. The more carefully, however, the dissenting opinions, especially that of Mr. Justice Holmes, are studied, the more doubtful the question becomes. The case was one of a now common sort, where workmen on strike maintain a patrol in front of the resisting employer's premises, with the object of intercepting other workmen who may come to take employment with him, and dissuading them from so doing. In this instance the patrol consisted of only two men, and if they were using any threats of violence, or inducing any breaches of existing contracts, such plainly illegal conduct was already under the injunction of the court. The question then before the Supreme Court was whether every sort of "picketing," and all attempts by the strikers to prevent men going into the plaintiff's employ, however peaceable the means used, should be enjoined as an unjustifiable infliction of damage to the plaintiff's business. The whole question turns, of course, on whether the infliction of the damage was justifiable. The majority of the court, without clearly separating the mere peaceable persuasion used by the defendants upon the other workmen from the intimidation supposed to be practised, held that the defendants' acts were not justified by their ultimate motive, that of securing better wages. They do not, however, distinguish clearly the cases where rivalry of interests in trade has been held to justify the intentional infliction of serious damage to business. Why the acts of the defendants in cases like *Mogul Steamship Co. v. McGregor*, [1892] A. C. 25, are within allowable competition, and the acts of the defendants in this case are not, is not made to appear very distinctly.

The truth is, as Mr. Justice Holmes points out in his opinion, and as he had before urged in an article in 8 HARVARD LAW REVIEW, 1, covering the very ground of this case, that the question of what sort of competition is allowable, or will furnish a justification for the intentional infliction of damage to business, is a mere question of public policy, which the most thorough knowledge of the law helps judges but little to decide. Nothing could be more apposite to this case than the following portions of the article just referred to: "The ground of decision really comes down to a proposition of policy of rather a delicate nature concerning the merit of a particular benefit to themselves intended by the defendants, and suggests a doubt whether judges with different economic sympathies might not decide such a case differently when brought face to face with the issue." As to which side the economic sympathies of the judges ought to incline towards, when they find such questions presented

to them for judicial legislation, there must unavoidably be two opinions. It would seem, however, that there is a serious discrepancy between the results reached in the cases of competition between rivals in the same trade, and the decisions in the cases where the struggle for economic advantage is between employers and employed. If cases such as *Mogul Steamship Co. v. McGregor*, *supra*, in England, and *Macauley v. Tierney*, 33 Atl. Rep. 1 (R. I.), and *Bowen v. Mattheson*, 14 Allen, 499, in this country, were decided according to the best public policy, as no one hitherto has denied, then in *Temperton v. Russell*, [1893] 1 Q. B. 715, *Flood v. Jackson*, [1895] 2 Q. B. 21, *Lyons v. Wilkins*, [1896] 1 Ch. 811, and finally this present case of *Vegeahn v. Gunter*, the courts have gone too far in the dangerous direction of interfering with the struggle of economic forces.

That the doctrine laid down in the recent English cases has by no means met with universal acceptance in that country, may be gathered from the sharp criticisms of *Flood v. Jackson* and *Lyons v. Wilkins*, which appeared at the time those cases were decided, in 12 Law Quarterly Review, 5-7, 201. It may be guessed that these criticisms were written by the learned editor of the Review, Sir Frederick Pollock, who has always opposed the extension of this class of actions. The very latest English authority, the second edition of Clerk & Lindsell on Torts, contains (pp. 14-25) the fullest treatment that has yet appeared of this whole class of cases, where "malice" or want of justifiable motive is made the foundation of liability; and in it the soundness of *Temperton v. Russell* and *Flood v. Jackson* is doubted (p. 22) on the ground of their inconsistency with *Mogul Steamship Co. v. McGregor*. In the Addenda, facing page 1, the case of *Lyons v. Wilkins* is noticed, and the suggestion made that it may be supported on the ground that persuasion by a picket necessarily involves some unlawful intimidation. The mere presence of a picket probably does in fact convey a covert threat of violence. For this reason the Massachusetts court may have practically reached a right result by enjoining the picketing altogether; but still Mr. Justice Holmes seems to have the advantage over the majority of the court in the discussion.

PROTECTION OF MINORITY STOCKHOLDERS. — The jurisdiction of equity to protect minority stockholders from the fraudulent or oppressive acts of a majority in control is firmly established. Difficult questions are, however, continually arising, because frauds in corporate affairs are often perpetrated by the cleverest of men acting under the best of legal advice. The New York Court of Appeals has recently dealt a severe blow at a fraudulent game in *Farmers' Loan & Trust Co. v. N. Y. & Northern Ry. Co.*, 44 N. E. Rep. 1043. This was an action to foreclose a second mortgage, two minority stockholders being allowed to come in and defend. It was shown that the New York Central Railroad determined to secure the Northern's property, and accordingly purchased a majority of its stock, and over \$2,000,000 of an issue of \$3,500,000 second mortgage bonds. A scheme to lease the property was wisely abandoned when opposition on the part of minority stockholders was manifested. The terms of the second mortgage, however, were that in case of default, etc., the trustee "may, and upon the written request of the holders of \$2,000,000 in amount of said bonds . . . shall apply to any court . . . for a foreclosure and sale." It appeared that in effect the trustee brought this suit

at the request of the New York Central. The defendants offered evidence to show that the New York Central was responsible for the failure to redeem the default on the bonds before it was too late, since the directors of the Northern, under the Central's control, diverted earnings and refused profitable traffic in order to enable the Central to procure a foreclosure and purchase at the sale. For rejection of this evidence the Court of Appeals has ordered a new trial, reversing the judgment of the General Term of the Supreme Court (28 N. Y. Supp. 933). The decision is based on the theory that it is an attempt in equity to secure the benefits of a wrong. That the trustee might have brought the action of his own motion, an argument that had weight below, is answered by saying that he might not and has not, so that the objection to the suit is not avoided.

To afford protection here is eminently proper. Not only are the rights of minority stockholders involved, but also the rights of other holders of bonds. That the latter will be given their full legal rights, even though the defendants prove their case at the new trial, is not to be doubted. The interesting question is whether a solution of the difficulty, more satisfactory and just to all parties than a foreclosure by the trustee, will not be found. If the case is proved, the New York Central is guilty of a wrong, for which no recovery can be had at law because of their control of the corporation. In the language of Mr. Morawetz it is "a conspiracy to commit a breach of trust" (Vol. I, § 529), which has in part succeeded. Under such circumstances had benefits been received under a contract, or money been wrongfully diverted, restitution would be compelled. Why should not equity as well decree reparation for the wrong? The ground of recovery in either case is that things must be put *in statu quo*. This would be a result as acceptable to bondholders as to stockholders. The former would receive back-interest, be protected from the risk of loss incident to a sale, and would still have their investment. It is conceived that little difficulty would be found in getting the necessary parties before the court by amendment under modern rules of practice.

THE WAY OF THE PHYSICIAN IS HARD.—An interesting example of the extent of a physician's liability for negligence is furnished by a recent decision of the Supreme Court of Massachusetts, *Harriott v. Plimpton*, 44 N. E. Rep. 992. The facts of the case were briefly as follows. The plaintiff, who was engaged to marry the daughter of M., was falsely accused of being afflicted with a venereal disease. M. employed the defendant, a physician, to examine the plaintiff, who consented to the transaction, and to report the result to himself and family. The defendant mistakenly pronounced the disease to be venereal. In consequence the engagement was broken. The court held that the defendant's duty of exercising ordinary diligence, care, and skill in a professional undertaking extended to a case where only information was sought; and that the breaking of the engagement was a damage not too remote to sustain the action. This conclusion, it is submitted, is entirely correct. The evident justice of the result, however, is at first more apparent than the really substantial grounds of decision which a further consideration of the case reveals.

It is a perfectly well established principle of law, "that he who undertakes the public practice of any profession undertakes that he has the

ordinary skill and knowledge necessary to perform his duty toward those resorting to him in that character." 2 Beven, Neg., 2d ed., 1397. *Sears v. Prentice*, 8 East, 348. This duty arises out of the fact of the undertaking merely, and therefore is not at all dependent upon the existence of any contractual relation. The plaintiff's right to careful and skilful treatment, then, was in no wise affected because the defendant was employed by M. *Pippin v. Sheppard*, 11 Price, 400; *Longmeid v. Halliday*, 6 Exch. 761, per Parke, B., at p. 767; *Dubois v. Decker*, 130 N. Y. 325. See also an article on Gratuitous Undertakings, 5 HARVARD LAW REVIEW, 222.

The defendant would have been bound to use due diligence in performing an operation or in prescribing a remedy. Was the duty of care any less in making an examination for the sole purpose of giving information to those interested? If legal damage might result in each case, it would seem irrational to draw distinctions. Legal damage certainly resulted in this case. As early as the sixteenth century, loss of marriage, whether the plaintiff was man or woman, was held to be injury sufficient to support an action of slander. *Dame Morrison's Case*, Jenk. 316; *Davies v. Gardiner*, Popham, 36; *Matthew v. Crasse*, 2 Bulst. 89. There is no reason why it should not equally well support an action for negligence. The only remaining question is whether the damage was too remote. It was surely a natural and proximate result, and, in view of the fact that part of the defendant's task was to report to M.'s family, it was not only a probable, but an intended consequence. Unusual as the steps to the decision at first appear, the conclusion is found to be sound in point of principle and law.

ONE-MAN CORPORATIONS — *BRODERIP v. SALOMON REVERSED*. — The decision of Mr. Justice Williams in the case of *Broderip v. Salomon*, affirmed by Lord Justice Lindley in the Court of Appeals (72 L. T. Rep. 755), has very recently been reversed by the House of Lords (*Salomon v. Salomon & Co.*, 13 *The Times* L. R. 46). This will be a satisfaction to most lawyers, and certainly a great relief to many business men. It is now settled that, in the absence of fraud, there is nothing in the intent or policy of the English Companies Act requiring each stockholder to have a real and independent interest in the business. Six of the required seven may be "straw" men, and nobody can object. If this state of things seems undesirable, it is for the legislature, not the courts, to make the change.

The question in this case did not come up between the creditors of the company and the "one man," the promoter vendor, but between the latter and the company itself. In liquidation proceedings against the company Aron Salomon filed an application, whereupon the liquidator counterclaimed, demanding that the applicant indemnify the company for all its debts. It was shown that the six stockholders beside Aron Salomon were his wife and five children, and that each one of these straw members held but one share of stock, although the capital was £40,000 in £1 shares. There seems to have been evidence enough to make it plain that the control of the business in fact was retained by Salomon when he sold it to this company, that he got all the profits, and that the primary object of the sale was to obtain the benefit of limited liability. Mr. Justice Williams held that the applicant was bound to indemnify the company for its debts. There are at least three possible grounds for going back of a company and holding its promoter to such a liability: (1) the

ground that no company at all exists, since the "spirit and policy" of the Companies Act were disregarded ; (2) that the promoter vendor is principal and the company agent ; and (3) that the company is trustee for him, and so entitled to be reimbursed for necessary expenses as to the *res* held in trust. The first theory could scarcely be advanced in this case by the company itself. Mr. Justice Williams seemed to take the second view, and Lord Justice Lindley the third. The House of Lords rejects all three, and criticises them freely. The Lord Chancellor says there is absolutely no evidence of a fraud on the company, as all the original stockholders knew what they were doing. Even the creditors could not have raised the question of fraud, for they had ample notice of the limitation of liability and the charges on the capital stock. (§ 43 of the Companies Act requires the registration of mortgages.) Nor may the decision of the two inferior courts be rested on the policy and spirit of the Act. Its spirit or intent should be gathered from its own words, and at all events cannot be invoked for the purpose of reading an exception into the statute.

EXPERT MEDICAL TESTIMONY. — That the deliberately expressed opinions of scientific men, upon matters within their province of study, should be of considerable assistance to a jury in settling an issue might reasonably be expected. It is generally agreed, however, that the testimony of medical experts, under present conditions, falls very far short of realizing any such expectation. It daily occurs that directly contradictory opinions are obtained from those whose views should be essentially alike. A single significant instance may be mentioned. In a recent murder trial in New York, six days were spent in hearing the opinions of medical experts. In charging the jury, the judge told them to disregard this testimony entirely, as too contradictory to be of any value. Nowhere is the dissatisfaction with this state of affairs so keenly felt as among reputable members of the medical profession. That their calling should be the subject of so much just criticism in respect to the expert testimony given by its members, is deplored by physicians of standing from all over the country. The desire to remedy the evils of the present system is manifesting itself actively. The medical associations of a great number of the States are busily discussing the question, and suggesting schemes for improvement, and already in New York, Illinois, Pennsylvania, and Minnesota legislative aid has been sought, though as yet in no case granted.

The fact that the experts are retained by the parties to the litigation seems to be the source of the difficulty. Under such circumstances it would perhaps be too much to expect that the testimony should be entirely unprejudiced. The position of the experts is really that of contending participants in the cause. That they so regard themselves, to a degree at least, and that in consequence their controversial feelings are aroused, is certain. An incident illustrating this is related of a case tried before three referees, in which the main point at issue was the physical condition of the plaintiff. Two doctors of wide reputation gave opposing opinions, each for the side on which he was retained, and each with positive assurance. A younger physician testified in a manner apparently unprejudiced, and with evident fairness. In arriving at their conclusion the referees were guided almost entirely by this last opinion, one of them pointing out to his colleagues the astonishing fact that the young man

had testified like a witness! The favorite plan for reform, at present, is that of the appointment of a commission of experts by the judges, to be paid for their services by the State. According to some, such a commission should be permanent, while others would prefer to have experts appointed only for individual cases as they came up. Either scheme would certainly be an improvement on the existing method.

IS A PAROL GIFT TO A BAILEE VALID?—The general question whether a mere bailee of a chattel can be changed into its absolute owner by bare words of the bailor, appears to have been decided, for the first time in England, in the recent case of *Cain v. Moon*, [1896] 2 Q. B. 283. In that case the owner of a chattel delivered it to the defendant for safe keeping, as the court understood the facts; and afterwards, being seriously ill, she said to the defendant, "The note is for you if I die." The court here found a good *donatio mortis causa*, holding that, although a delivery of the chattel was necessary, as in the case of a gift *inter vivos*, the antecedent delivery with a different intent was sufficient. The decision went expressly on the ground that there was no direct authority on the point either way, and that it seemed reasonable that an antecedent delivery should be held sufficient, without requiring the intended donee to go through the form of handing back the chattel and again receiving it. It will be noticed that the court assume without discussion that the rule making delivery essential to the validity of the gift is to be applied in the same manner to a *donatio mortis causa* and a gift *inter vivos*. They do not give their theoretical view as to the nature of the transaction; but there seems to be no objection to calling it a parol license to the bailee to keep the chattel, which is acted upon by the bailee, and therefore becomes irrevocable. As a mere release of the bailor's right of action the words are, of course, without effect. Several American courts have reached, without much discussion, the same result as the court in *Cain v. Moon*. Two cases in point are *Providence Savings Inst. v. Taft*, 14 R. I. 502, and *Porter v. Gardner*, 60 Hun, 591.

LEGAL CAUSE. — The task of formulating a satisfactory rule for determining the existence of cause and effect in deciding whether, in an action based on tort, a plaintiff may hold a defendant liable for injuries to the former, continues to vex the courts. The Supreme Court of Canada recently handed down what is submitted to be a correct decision in *Grinsted v. Toronto Ry. Co.*, 24 S. C. R. 570. The facts were similar to those so often appearing in cases of this sort. The plaintiff, wrongfully ejected from one of the company's cars on a winter's night, took cold, and suffered an attack of bronchitis and rheumatism. He was allowed to recover for the sickness as an injury resulting from the defendant's act. The court rested their decision on the ground that the question whether the result was *proximate and natural* was to be determined by the jury.

So many rules, theories, and maxims regarding Legal Cause have been evolved from the time of Lord Bacon down to the present day, that there is now a profusion of recorded thought tending to confuse a fundamentally important subject. It is submitted that to begin with the simplest possible statement of the question is the proper way to work

out the true rule, if there is one. When a plaintiff comes into court and shows that he has suffered such damage as the law will recognize, and that the defendant's conduct has failed to come up to the standard required by law, the point in issue is simply, Did the defendant do this? It is certainly possible to contend that the average juror might better be trusted to work out justice in answering the question thus stated according to the dictates of common sense, than in applying a complicated rule of law, however elaborately it be explained. If, however, a rule can be phrased which will embody the real intent and meaning of this simple question, and will do nothing more, such rule will have the decisive advantage of precision. The effort to find a more definite form in which to leave the issue to the jury, then, is certainly worth while. It is suggested that the solution was reached when the idea of looking at the chain of events from the "after" point of view was conceived. *Wardlaw, J.*, in *Harrison v. Berkley*, 1 Strob. 525; *Earl, J.*, in *Ehrgott v. Mayor of New York*, 96 N. Y. 280; *Smith v. London & Southwestern Ry. Co.*, 6 Com. Pl. 14. If it appear that in fact nothing which could be an efficient cause has intervened between the act complained of and the ensuing harm, the causal connection between the two would seem to be sufficiently established. In such a case, the fact that the result was one not reasonably to have been foreseen, or not found likely to occur on calculation of chances, would certainly not make the defendant's act any less the cause. The fact that the consequence was probable is important in that such probability determines, in a measure, the character of the defendant's act. That is, the occurrence of an injury which was or should have been foreseen would appear to be a natural and proximate result, even though circumstances intervened which would break the causal connection had the result not been contemplated. (Lord Wensleydale in *Lynch v. Knight*, 9 H. L. Cas. 577.) The Supreme Court of Canada in laying down the natural and proximate rule adopted the proper definite form of leaving with the jury the question, Did the defendant do this wrong?

CONSTITUTIONALITY OF BI-PARTISAN POLICE COMMISSION LAW. — A few months ago the legislature of New York passed a statute providing for the appointment of four police commissioners by the Common Council of Albany. It was stipulated that no person should be eligible for the office who was not a member of one of the two leading political parties in the Common Council, and that not more than two of the commissioners should be elected from either party. The opponents of the statute were not slow to assert that the State legislature had no power to prescribe any such qualifications for municipal officers; that the statute was an unwarrantable interference with the right of local self-government; and that, even apart from this, the statute was unconstitutional as arbitrarily rendering ineligible for the office the class of citizens who belong to neither of the leading political parties. The Court of Appeals, in *Rathbone v. Wirth*, 45 N. E. Rep. 15, has recently sustained these contentions. The opinion of Gray, J., embodies a valiant defence of the right of municipal home rule against the slightest encroachments. The learned judge speaks of the question as one "of surpassing importance to the citizens of the State," and deals with it throughout in a very statesmanlike manner. He maintains that under the article of the State constitution which provides that municipal officers shall be elected by the inhabitants of the municipality, or

by such local authorities as the legislature shall name, the legislature cannot, by designating the class out of which the officers shall be chosen, interfere with the freedom of choice which it was clearly intended that the local electors should exercise.

One may well hesitate before dissenting absolutely from this opinion. But it should be observed that there is something to be said in favor of the opposite view. It will of course be granted that the legislature cannot appoint municipal officers. (See the leading case of *People v. Hurlbut*, 24 Mich. 44.) Nor can it, by arbitrarily limiting the field of candidates, attain practically the same result. It has been laid down, to be sure, in general terms, that the legislature can prescribe the qualifications of city, town, or village officers. (*State v. Von Baumbach*, 12 Wis. 310.) But this must be taken in a limited sense. While the legislature cannot, for example, forbid the election to a municipal office of a Republican negro as such (Tuck, J., in *Mayor of Baltimore v. State*, 15 Md. 376, 468), it would seem that it can prescribe the mental qualifications which the candidate must possess, as well as other qualities reasonably essential to fitness. (See, for instance, the statute under discussion in *People v. Warden of City Prison*, 144 N. Y. 529.) It is clearly a question of degree. The legislature can create a new municipal office, and it hardly seems beyond the scope of its power to establish such reasonable qualifications for candidates as shall be essential to the attainment of the end for which the office was created. In the case of the Albany Police Commissioners, may it not have been a reasonable requirement, considering the nature of the office, that the two leading political parties should be equally represented on the board? If so, it may fairly be argued that there is no such manifest conflict between the law in question and the constitutional provision for local self-government as to warrant holding the former a nullity.

It is on the other point, however, that O'Brien, J., in his concurring opinion, lays most stress, namely, that the law disqualifies for the office all who are not members of one of the two leading political parties, and is unconstitutional for that reason. This view finds support in the cases of *Attorney-General v. Board of Councilmen of the City of Detroit*, 58 Mich. 213, and *City of Evansville v. State*, 118 Ind. 426. Here too it may be urged that it is only a question of degree. The legislature might disqualify illiterate or dishonest persons from holding the office of mayor of a city on the ground that the nature of the office demanded it. May it not be said that in these days, when the proportion of citizens belonging to one of the two large political parties is so very great, it is reasonably necessary to leave other parties out of consideration in establishing a non-partisan board of only four officers?

RECENT CASES.

AGENCY—AUTHORITY COUPLED WITH AN INTEREST.—P. promoted a company for the purpose of purchasing from him and working a mining property. C. signed an underwriting letter addressed to P., by which he agreed, in consideration of a commission, to subscribe for a specified number of shares in the company, and by which he authorized P. to apply for the shares on behalf of C., and the company to allot them. He further agreed that this application should be irrevocable. P. by letter accepted these terms. Later C. wrote to P. and to the secretary of the company repudiating

the agreement. P., however, applied on behalf of C. for the shares, and the company allotted them, and placed him on the register. *Held*, that C. was not entitled to have his name removed from the register, inasmuch as the authority given to P., for sufficient consideration, was an authority coupled with an interest, and therefore not revocable. *In re Hannan's Empress Gold Mining & Development Co.*, [1896] 2 Ch. 643.

It is well settled that an authority coupled with an interest is irrevocable; but the courts have been unable to settle upon a comprehensive and precise definition of an interest. See *Mechem on Agency*, §§ 204-207, collecting authorities; *Anson on Contracts*, 263-265; *Parsons on Contracts*, 8th ed., *69; opinion of Marshall, C. J., in *Hunt v. Rousmanier*, 8 Wheat. 174. The decision in the principal case is clearly within the broad principle stated by Wilde, C. J., in *Smart v. Sanders*, 5 C. B. 917, to the effect that an authority coupled with an interest exists, and is irrevocable, "where an agreement is entered into on sufficient consideration, whereby an authority is given for the purpose of conferring some benefit on the donee of that authority." In the language of Lopes, L. J., "The object was to enable Mr. Phillips, the vendor, to obtain his purchase money, and it therefore conferred a benefit on the donee of the authority." But see *Anson on Contracts*, 264.

ATTORNEY AND CLIENT—ACTION FOR MONEY COLLECTED—STATUTE OF LIMITATIONS—TRUSTS.—An attorney collected money for his client by effecting the settlement of a suit. Two days later he informed the client, and promised to pay it over as soon as he had settled certain contingent fees. The client refused to ratify the settlement or to accept the money, and during the pendency of proceedings to have the settlement set aside the attorney continued to hold the money. Suit was brought to recover it, and the statute of limitations was set up as a bar. *Held*, that the relations between the attorney and the client did not constitute a technical and continuing trust alone cognizable in equity and exempt from the statute; and that the action was barred after the lapse of four years from the time the attorney gave notice of the collection. *Schofield v. Woolley*, 25 S. E. Rep. 769 (Ga.).

Constructive trusts are not exempt from the operation of the statute of limitations, as in the case of trusts cognizable alone in equity. See 2 *Wood on Limitations*, §§ 200, 215, and a recent case, *Railway Co. v. Stillwater*, 68 N. W. Rep. 836. It would seem that the court, in the principal case, rightly viewed this as at most a constructive trust, and correctly held that the attorney, as an agent liable at law, was entitled to set up the statute. See 1 *Wood on Lim.*, § 18; *Godefroi's Trustees*, 309. Various views obtain, however, as to when the statute should begin to run. See 1 *Wood on Lim.*, chap. X. It has been held in New York that where the attorney notifies the client of the collection, as in the principal case, the statute does not begin to run until the client has had a reasonable time in which to make demand. *Lyle v. Murray*, 4 Sandf. 590. On the other hand, it has been held in Pennsylvania, in agreement with the principal case, that under such circumstances the statute runs from the time of notice. *McDowell v. Potter*, 8 Pa. St. 189.

BILLS AND NOTES—DEMAND NOTE—WHEN CLAIM AGAINST INDORSER IS BARRED.—A demand note with interest payable annually was indorsed by the payee to the plaintiff on the day it was made. The plaintiff did not present it to the maker for payment until ten years after its date. Payment being refused, the plaintiff notified his indorser, and seeks to recover from him the amount of the note. *Held*, a demand note, whether with or without interest, does not mature as to an indorser until demand is actually made, but that demand must be within a reasonable time. *Leonard v. Olson*, 68 N. W. Rep. 677 (Iowa).

In England and in New York such a note as this is regarded as a continuing security which does not mature until payment is demanded. *Brooks v. Mitchell*, 9 M. & W. 15; *Merritt v. Todd*, 23 N. Y. 28. But the anomalous doctrine that a demand note is due immediately, without any demand, has furnished ground for argument that the indorsee who does not present such note for payment on the day he receives it loses his rights against the indorsers. The courts have not adopted this rule strictly, but have held, as in the principal case, that presentment within a reasonable time is sufficient. 2 *Ames's Cases*, on Bills and Notes, 291.

BILLS AND NOTES—FAILURE OF CONSIDERATION—SALES—RESCISSION.—*Held*, that a promissory note given for a pony, the title to the pony to remain in the vendor until payment of the note, and the vendee having the option to rescind the sale before the note is due, is void for failure of consideration, where the pony died before the option was exercised. *Lyons v. Stills*, 37 S. W. Rep. 280 (Tenn.).

This case stands or falls according to whether the risk of loss was on the vendee or vendor. The principal case is *contra* to the better view, that it was on the vendee, and

that the title remained in the vendor simply as security, a sort of chattel mortgage. *Chicago Railway Equipment Co. v. Merchants' Bank*, 136 U. S. 268. The privilege of option should not shift the liability of loss from vendee to vendor. Had the vendee agreed to take the pony if he liked it, instead of agreeing to give it up if he did not like it, the loss would have been on the vendor. *Carier v. Wallace*, 42 N. Y. 190; *Hunt v. Wyman*, 100 Mass. 198. The court, however, seem to have lost sight of this distinction, although the facts are somewhat meagrely reported.

CARRIERS—LIMITING LIABILITY—EXPRESS MESSENGERS.—*Held*, that a carrier can lawfully contract to be free from all liability for injuries that may negligently be done to an express messenger. *R. R. Co. v. Kiefer*, 44 N. E. Rep. 796 (Ind.).

As it is absolutely necessary that railroads, as public servants, should conduct their business with the utmost care, most courts do not allow them by contract with their passengers to do away with all liability for injury. The Indiana court holds that this restriction should not apply to contracts with express companies, since they have no common law right to demand carriage. *Express Cases*, 117 U. S. 1. These cases were treated as if expressmen only were concerned, and it was said that railroads had never held themselves out as carriers of express companies. The vital question, whether the public interest demanded that these companies should have a right to accommodation on trains, was not considered. But assuming that these decisions were not inconsistent with the carrier's duty to the public, though the weight of authority is *contra*, it would seem that, if carriers do agree to take expressmen, they should carry them on the same conditions that they carry others. This does not prevent a contract that the railroad should not be liable for injury caused by plaintiff's employment in the baggage car. See *Bates v. R. R. Co.*, 147 Mass. 215.

CARRIERS—NEGLIGENT DELAY—ACT OF GOD.—*Held*, that a carrier is responsible for the loss of goods which he negligently shipped late, although they were destroyed by act of God. *Wald v. Pittsburgh R. R.*, 44 N. E. Rep. 888 (Ill.).

In cases of deviation, where loss could not have been expected to result, the carrier is nevertheless liable; he has intermeddled with the goods. The doctrine that the same should be true of delay was applied in *Reed v. Spaulding*, 30 N. Y. 630; but it may well be argued that the rule should not apply to a mere nonfeasance. Moreover, the carrier was held liable for deviation because all insurance was thereby forfeited, a reason that does not exist where the carrier has been dilatory in shipping. This question however does not arise in the principal case, since the carrier was not delaying at the time of the accident. After transportation in due course has begun, he can only be liable on the doctrines of legal cause, and this loss was not the natural and probable consequence of the delay. The decisions in New York and Missouri are in *accord* with the principal case; those in Massachusetts, Pennsylvania, and the United States courts are *contra*.

CONFLICT OF LAWS—EXECUTION OF POWER—DOMICIL.—Property was settled on A for life, with power of appointment by will. The settlement was made in England, and all the parties to it had at the time English domicils. Later A acquired a French domicil, and executed a will, purporting to exercise the power of appointment. The will was valid according to English, but invalid according to French law. *Held*, the power was well exercised. *In the Goods of Huber*, [1896] P. 209.

It is the general rule that a will is good or bad, as to its formal requirements, according to the law of the testator's domicil at the time of his death. There would seem to be no sufficient reason why any exception to this rule should be made, when the will, instead of being a direct disposition of property, is the exercise of a power of appointment. Dicey's Conflict of Laws, 703. But in the latter case it is settled in England, if the property be personalty, that the will of the donee is a good exercise of the power, whether the will conform to the law of the donee's domicil, *D'Huart v. Harkness*, 34 Beav. 324; or to that of the donor, *In the Goods of Alexander*, 29 L. J. (P. & M.) 93. It was on the authority of the last named decision that the principal case was decided, the court recognizing that its holding was wrong on principle. In America precisely this question does not seem to have arisen. But two decisions in cases closely analogous appear to indicate that the United States courts disregard the law of the domicil of the donee entirely in determining whether a power of appointment has been duly exercised by will, looking only to the domicil of the donor. *Bingham's Appeal*, 64 Pa. St. 345; *Cotting v. De Sartiges*, 17 R. I. 668. This involves a still greater departure from principle. Cf. *Sewall v. Wilmer*, 132 Mass. 131.

CONFLICT OF LAWS—VALIDITY OF CONTRACT.—A resident of Pennsylvania, on application made in that State to an agent of a New York building and loan association, became a member thereof, and obtained a loan from it, giving notes and bond therefor, secured by mortgages on Pennsylvania lands, all the instruments describing

the association as of Syracuse, N. Y., and declaring the notes payable at its office there. *Held*, that the contract was not governed by the usury laws of Pennsylvania. *Bennet v. Eastern Building & Loan Co.*, 35 Atl. Rep. 634 (Pa.).

There is much confusion among the authorities on this question. On principle, the decision seems wrong. The sovereign power in Pennsylvania has declared usurious contracts to be illegal. Such contracts, made in Pennsylvania, never acquire a legal existence. "They are not only void in that State, but void in every State, and everywhere." *Akers v. Demond*, 103 Mass. 323; *Scudder v. Union Bank*, 91 U. S. 406. 10 HARVARD LAW REVIEW, 170.

CONSTITUTIONAL LAW — BI-PARTISAN POLICE COMMISSION. — *Held*, that a statute providing for the election by a city council of four police commissioners, and requiring that two be chosen from each of the two leading political parties in the council, is unconstitutional. *Rathbone v. Wirth*, 45 N. E. Rep. 15 (N. Y.). See NOTES.

CONTRACTS — STATUTE OF FRAUDS. — The defendant made an offer in writing to agents of the plaintiff to buy a parcel of land, saying that, if his offer was accepted, he would sign a certain draft contract, the contents of which were known to him. The agents accepted the offer, and, inserting the vendor's name, sent the draft contract to the defendant. It was never signed, and on suit for specific performance by vendor, it was *held* that vendee could not plead the statute of frauds. *Filby v. Hounsell* [1896] 2 Ch. 737.

The defendant claimed that he had not signed anything which directly or sufficiently set forth who the vendor was. But the offer of the defendant contains the names of the contracting parties, and this is sufficient to satisfy the statute of frauds. Who the principals are may be proved by extrinsic evidence. *Morris v. Wilson*, 5 Jur. (N. S.) 168. If it may be looked on as settled that an agent may accept without disclosing his principal, it matters not that the defendant did not sign the draft contract, since it had been particularly referred to by him in his written offer which was accepted by the agent. *Morris v. Wilson*, *supra*.

CORPORATIONS — EXPULSION OF MEMBERS. — Relator, a member of a club incorporated for social purposes, being dissatisfied with the rejection of a candidate for membership, sent a circular to the other members, setting forth the rejection and urging the calling of a special meeting. Relator was notified to appear before the board of directors and give an explanation of his conduct. He appeared, was heard, and was expelled. *Held*, that a mandamus would issue to review the proceedings of the board of directors. *People v. Up-Town Assoc.*, 41 N. Y. Supp. 154.

In its opinion, the court concedes that the directors had power to annul relator's membership for conduct which might, in their judgment, endanger the welfare or character of the club. This alone would seem to vest so broad a discretion in the directors as would render a review by the courts inadvisable. On a similar question in the case of a commercial organization, a contrary result was reached very recently in Illinois. *Board of Trade v. Nelson*, 44 N. E. Rep. 743. It is submitted that the decision of the principal case is against the great weight of authority, to the effect that where the charter or rules provide a certain method of disfranchisement for specific causes, the assent of the member thereto being a fundamental condition of membership, the courts will not on mandamus examine into the merits of a decision of expulsion after the member has been regularly tried under such rules. High Ex. Rem., § 291; *Spilman v. Supreme Council*, 157 Mass. 128. The principal case is analogous to the very exceptional action of the New York court in issuing a writ of mandamus to compel the granting of a college degree. See 9 HARVARD LAW REVIEW, 536.

CORPORATIONS — NOTICE — IMPUTED KNOWLEDGE OF THE COMMON OFFICER OF TWO COMPANIES. — A company borrowed money of a society, but the meeting authorizing the borrowing was held irregularly. The secretary of the company was the secretary of the society and knew of this irregularity. *Held*, in proceedings for the winding up of the company, that the knowledge of the secretary could not be imputed to the society, and that the claim for the money lent could be proved at the winding up of the company. *In re Hampshire Land Co.*, [1896] 2 Ch. 743.

The court follow the case of *In re Marseilles Extension Co.*, L. R. 7 Ch. 161, laying down the rule that, unless the common officer had some duty imposed on him, either by the company of whose irregularity he had knowledge to give such notice, or by the company alleged to be affected by the notice to receive such notice, then his knowledge is not to be imputed. The case of *Gale v. Lewis*, 9 Q. B. 730, is distinguished on the latter ground. The line here drawn marks a clear and logical stopping place in this branch of the subject of imputed knowledge.

CORPORATIONS — RIGHTS OF MINORITY STOCKHOLDERS. — *Held*, that a foreclosure suit cannot be maintained at the request of a larger holder of bonds in a railroad corporation when that holder, also owner of a majority of the stock, procured a friendly board of directors to divert assets and refuse profitable traffic in order to create a default which would enable said holder to compel the trustee to foreclose, and so enable him to purchase at the sale. *Farmers' Loan & Trust Co. v. New York & N. Ry. Co.*, 44 N. E. Rep. 1043 (N. Y.). See NOTES.

CORPORATIONS — STOCK — DAMAGES FOR CONVERSION. — *Held*, that the measure of damages for the conversion of stock of a corporation is its value at the time of the conversion, with legal interest. *Mining Co. v. Bliley*, 46 Pac. Rep. 633 (Col.).

It is not disputed that the principal case is in accord with the weight of authority throughout the States, but, being *res nova* in Colorado, it may well be regretted that a more equitable rule was not laid down by the court. The fluctuating value of stock has led to a difference of opinion on this point. See Sedg. on Dam., 8th ed., 99-135. But the true and just measure of damages in these cases would seem to be the highest intermediate value of the stock between the time of conversion and a reasonable time after the owner has received notice of it, so as to enable him to replace the stock. *Galigher v. Jones*, 129 U. S. 193.

EQUITY — RELEASE — GENERAL TERMS. — Plaintiff was injured by defendant's negligence, and signed a release, general in its terms, but mentioning particular injuries which both parties supposed to be the only ones of consequence. Afterwards, on discovering a more serious injury which disabled him for life, he brought an action at law, and filed a bill in equity to limit the effect of the release, as pleaded by the defendant, to the particular injuries mentioned. On demurrer to the bill, it was held that a release, however general its terms, cannot apply to matters of which the parties had no knowledge at the time it was executed. 71 Fed. Rep. 21, reversed. *Lumley v. Wabash Ry. Co.*, 76 Fed. Rep. 66.

The ground of the decision is, that where a contract is so broad in its language as to cover matters of which the parties were ignorant, equity will confine its application to the real purposes of the bargain. The court cites *Farewell v. Coker*, 2 Mer. 353, in which the House of Lords held that, in determining whether a release passed a reversion in fee, it was a material issue whether the one signing the release knew that she had the reversion and intended to pass it. See also, to the same effect, *Ramsden v. Hyllon*, 2 Ves. 304, 309, and *Lyall v. Edwards*, 6 H. & N. 337.

EVIDENCE — OPINION — MENTAL CONDITION. — *Held*, that one not an expert may testify as to a person's mental condition, on showing an acquaintance with him. *Kosteletzky v. Scherhart*, 68 N. W. Rep. 591 (Iowa). A contrary decision was rendered in New Mexico, three judges dissenting. *Territory v. Padilla*, 46 Pac. Rep. 346.

When the element of judgment which accompanies every sensation is one on which reasonable men could not differ, the object of sensation is a fact. Where men might differ, the element of judgment is called in the law opinion, and it is desirable as far as possible to limit testimony to facts on which such opinion is based. The jury should draw all conclusions. Opinion enters into questions of mental condition, but it is difficult to present before a jury acts, gestures, and expressions from which insanity is to be inferred. Some courts, realizing that such testimony must often be so partial as to lead to an erroneous conclusion, hold with Iowa that the truth is more likely to be reached by receiving instead the opinion of the witness. The decision of the dissenting judges in the New Mexico case seems wiser, to require the witness to state all the facts possible, and then his own conclusion. The opinion may thus be compared with the facts, and the facts interpreted by the opinion. This is analogous to a witness's supplementary testimony in regard to character.

EVIDENCE — PROOF OF AGENCY IN CRIMINAL PROSECUTION. — In the prosecution of a police captain for extortion by threats made by an inferior officer, evidence to show that, in extortions from other persons the inferior officer was acting for the defendant, is inadmissible to show that in the extortion in question he was acting as defendant's agent. *People v. McLaughlin*, 44 N. E. Rep. 1017 (N. Y.).

It would seem that this evidence should have been admitted as bearing on notice. If the superior knew of his inferior's wrongful act, and did nothing about it, that is certainly a good basis for further inference. It was shown conclusively, that in former instances the inferior had been acting with his superior's knowledge and approval. Such evidence seems strongly in point to show knowledge in the present instance, and does not fall within any rule of exclusion.

EVIDENCE — RES JUDICATA. — Plaintiff and defendant had, in their individual capacities, litigated an issue upon a non-negotiable contract. On the trial of a subse-

quent suit between the same parties, plaintiff sued as the assignee of a right of a third party against defendant, arising upon a different chose in action, the assignment having been made after the breach of such second contract by defendant. *Held*, that a fact found to be true by the former adjudication is not *res judicata* in the latter suit. *Fuller v. Ins. Co.*, 35 Atl. Rep. 766 (Conn.).

The decision of the court seems sound. The assignee of a chose in action, being subject to the same defences as the assignor, may be regarded as the representative of the latter, and the first judgment *in personam* against the assignee individually could not have been taken advantage of as *res judicata* by the assignor, his principal, who was a stranger to it. *Petrie v. Nuttall*, 11 Exch. 569.

INJUNCTION — "PICKETING" BY STRIKERS. — Workmen kept a patrol in front of the shop of an employer with whom they had a dispute, to prevent other workmen from entering his employ. They had already been enjoined from using intimidation. *Held*, that their acts were not justified by their motive of getting better wages for themselves, and the picketing must be enjoined altogether. *Vegetahn v. Gunter*, 44 N. E. Rep. 1077 (Mass.). See NOTES.

INSURANCE — INSURABLE INTEREST IN A LIFE. — The appellant issued to the appellee a policy for \$2,000 on the life of his mother, who was, at the time, seventy-six years old, and was being supported by the son. There was nothing in the appellee's complaint to show that he expected any pecuniary advantage, in the way of maintenance, service, or the like, from the continuance of the life of his mother. Neither the mother nor the son was under legal liability to support the other. *Held*, that the appellee had no insurable interest in the life of the assured. *People's Mut. Ben. Soc. v. Templeton*, 44 N. E. Rep. 809 (Ind.).

In England, although it is hard to reconcile some cases, it seems to be the law that a policy is supported by an interest derived from relationship alone in case the party obtaining the policy has a legal claim for support upon the assured. Bliss on Insurance, 16. It is said to be the established rule in the United States that the interest must be of a pecuniary nature, relationship alone not being sufficient. 7 Am. Dec. 42, note, where American authorities are reviewed. But see Bliss on Ins., 27-33. It has been held in England, in agreement with the principal case, that a son had no insurable interest in the life of his father, a pauper, dependent upon the son for support. *Schilling v. Ins. Co.*, 27 L. J. Exch. 16. See also *Life Ins. Co. v. Hogan*, 80 Ill. 35. In *Ins. Co. v. Kane*, 81 Pa. St. 154, the court held, resting its decision in part upon relationship and in part upon the legal liability of the son to support the assured, that there was an insurable interest. This Pennsylvania decision seems wholly illogical, as legal liability on the part of the beneficiary to support the assured would naturally tend to negative insurable interest.

INSURANCE — REVOCATION OF POLICY. — Where the insurers had unwarrantably declared a life policy forfeited, *held*, that the assured might regard the contract rescinded, and recover from the insurers the paid premiums with interest. *Van Werden v. Equitable Life Ass. Soc.*, 68 N. W. Rep. 892 (Iowa).

It is difficult to see how there can be a rescission of the policy, for rescissions require that the parties be placed in the position they held before the contract; Pollock on Contracts, 6th ed., 563; and the insurers have undergone a risk which cannot be repaired. But the policy is, of course, still good, and by a yearly tender of premiums a right of recovery may be retained for the executors of the assured. 2 Biddle on Insurance, § 1197. On the theory of anticipatory breach, however, an action might be had for damages now; and while the view taken by the court here is supported (*McKee v. Phoenix Co.*, 28 Mo. 383), it is more satisfactory to regard it as a question of damages. The amount of damages to be recovered would logically seem to be the difference between the amount the assured would have to pay in premiums for another policy of the same value and the amount he would have had to pay on the cancelled policy, both amounts to be computed with reference to the probable duration of life of the assured. *Barney v. Dudley*, 42 Kan. 212.

JUDGMENTS — EFFECT OF APPEAL. — *Held*, in *quo warranto* proceedings against a public officer, that a judgment of ouster divests such officer at once of all official authority, notwithstanding the fact that an appeal from this judgment is taken and an appeal bond filed, the effect of which, under the Washington code, is to "stay proceedings on the judgment." *Fawcett v. Superior Court of Pierce County*, 46 Pac. Rep. 389 (Wash.).

Such a decision as this may evidently lead to great irregularity in the administration of public affairs, but that it represents a well settled rule of procedure is apparent from the authorities cited in the opinion of the court. See especially *People v. Stevenson*, 57 N. W. Rep. 115; *State v. Woodson*, 31 S. W. Rep. 105; *Allen v. Robinson*, 17 Minn.

113. There seems to be a distinction between judgments which are self-executing and judgments which require for their execution the issuance of further process. In the former class, of which disbarment proceedings are an example, the taking of an appeal leaves the judgment unaffected; in the latter class, as, for instance, a judgment for damages, the taking of an appeal affects the judgment, for it stays the issuance of further process, without which the judgment is ineffectual.

PARTNERSHIP — INSOLVENCY — PROOF OF FIRM DEBTS. — *X*, a member of a partnership, becomes insolvent individually. The firm is solvent. *Held*, that, although in the distribution of assets individual creditors have preference over firm creditors, yet the latter may prove their claims and vote on the discharge of the insolvent. Knowlton, J., dissenting. *Clark v. Starwood*, 44 N. E. Rep. 537 (Mass.).

Approaching this question from the mercantile point of view, and regarding the partnership as a legal entity, the decision could not be supported. For on that hypothesis the firm and the individuals composing it are two distinct legal persons, and the creditors of one have no right to proceed against the assets of the other. Taking the common law conception of a partnership, the weight of authority is probably with the leading case, though there is much conflict. *Barclay v. Phelps*, 4 Met. 397, and *Corey v. Perry*, 67 Me. 140, are leading cases for and against the decision of the majority. The result reached by the Court involved great hardship on the individual creditors. For they were outnumbered by the firm creditors, who voted to discharge the bankrupt, contrary to the wishes of the individual creditors. It seems that inasmuch as the partnership creditors were fully protected, as the firm was solvent, they should not have been allowed to affect the rights of other parties.

PARTNERSHIP — RIGHTS OF NON-RESIDENT PARTNER. — A partnership doing business in Massachusetts was composed of two citizens of Massachusetts and one citizen of New Hampshire. A resident of the former State, while indebted to the partnership, obtained his discharge in bankruptcy under the Laws of Massachusetts. *Held*, that the partnership claim was not barred by these bankruptcy proceedings. Field, C. J. and Allen and Holmes, JJ. dissenting. *Chase v. Henry*, 44 N. E. Rep. 988 (Mass.).

It is an undoubted proposition of law that a discharge in bankruptcy in one State does not bar actions by residents of other States on their personal claims against the debtor. The court in the principal case rest their decision on the above proposition, reasoning to the effect that, as the bankruptcy court had no jurisdiction over the partner who resided in New Hampshire, it had no jurisdiction over the partnership claim in which this non-resident partner was interested. It is submitted that this result does not follow from the rule, and that the conclusion of the judges who formed the minority is correct. It is clear that, after the debtor's discharge the Massachusetts partners lost their previous right of action. The New Hampshire partner could not bring any partnership action without joining his two associates as plaintiffs; but they, by the express decision of a competent court, have no standing in an action against the partnership debtor. How then can the New Hampshire partner enforce the partnership claim? An analogous case to the one under discussion is where the statute of limitations has run against one of several parties who are entitled to a joint action. In such cases, it is held that the action is barred. *Marsteller v. McLean*, 7 Cranch, 156; *Perry v. Jackson*, 4 T. R. 516.

PROPERTY — ADVERSE POSSESSION. — The plaintiff's boundary fence, encroaching on a highway, was maintained for over ten years. *Held*, that as the possession was with no claim of right, it was not adverse. *Rae v. Miller*, 68 N. W. Rep. 889 (Iowa).

The decision follows the anomalous law in Iowa that claim of right is a necessary part of adverse possession. *Grube v. Wells*, 34 Iowa, 148; *Donahue v. Lannan*, 70 Iowa, 73. That this position cannot be supported on principle is clear, inasmuch as the right of the person ousted is the same whether the one by whom he is ousted has a claim of right or not. In either case his right of action accrues at once, and the statute declares that one cannot sue after ten years has elapsed since his right accrued. The court relies on the case of *Slocumb v. R. R. Co.*, 57 Iowa, 675, which lays down a similar rule in regard to possession of land on the right of way of a railroad; but unless that case can be supported on the ground that the right of the company to the way did not accrue until it should have occasion to use it, the decision is equally indefensible. The principal case might, however, have been decided on the ground that the statute does not run against the State. *Philadelphia v. R. R. Co.*, 58 Pa. St. 253. Although this is the general doctrine it has not yet been so decided in Iowa, and the court do not mention it, preferring to rely on the questionable doctrine concerning adverse possession that has already been established in that State.

PROPERTY — COVENANT TO INSURE IN LEASE. — The lessee covenanted to insure the premises, and if they were destroyed by fire to apply the insurance to rebuilding, or pay it over to the lessor, at his option. *Held*, that the covenant ran with the land, and bound the assignee. *Northern Trust Co. v. Snyder*, 76 Fed. Rep. 34.

The case goes one step beyond that of *Vernon v. Smith*, 5 B. & Ald. 1, which holds that such a covenant to insure and rebuild runs with the land, in that in the principal case the lessor has the option of taking the money and not rebuilding. The court is clearly correct in its decision, for the alternative provision plainly concerns the use and occupation of the land. The more interesting question whether a covenant to insure only would run is left undecided, but the court intimates that, as a contract of insurance is a personal one of indemnity, therefore it probably would not run.

PROPERTY — DONATIO MORTIS CAUSA — DELIVERY ANTECEDENT TO GIFT. — *Held*, that an antecedent delivery with a different intent is sufficient to support a subsequent *donatio mortis causa*. *Cain v. Moon*, [1896] 2 Q. B. 283. See NOTES.

PROPERTY — RESCISSION OF SALE — COLLATERAL AGREEMENT. — The agent of a land company sold and conveyed a lot, agreeing without authority to sell no lots at a smaller price. On the company's selling lots to others for less, the vendee seeks to recover his purchase notes, offering to reconvey the land. *Held*, that as the company would not have obtained his purchase without the promise, they cannot take the benefits of the contract without the burdens, and the collateral agreement may be proved. *Rackemann v. River Bank Improvement Co.*, 44 N. E. Rep. 990 (Mass.).

The vendee accepted one entire offer from the agent (Pollock on Contracts, 6th ed., 38), and if that offer was unauthorized, it must be ratified or rejected in its entirety by the vendor, benefits and burdens alike. Mechem on Agency, § 775. The deed alone was not intended to cover the whole contract, for the collateral promise was a part of it, and so should be provable. Stephen Dig. Ev., art. 90. Then, as the whole contract cannot be enforced, and the parties can be placed in their former position, equity will rescind the contract and order the consideration repaid, the plaintiff reconveying the land. 2 Pomeroy, Equity, § 869.

PROPERTY — SUPPLEMENTARY PROCEEDINGS — EXEMPTIONS. — *Held*, the accrued wages of an employee of a city fire department cannot, on grounds of public policy, be got at by supplementary proceedings. *Sandwich Manuf. Co. v. Krake*, 68 N. W. Rep. 606 (Minn.).

A pension or salary given to an individual as compensation for a continuing public duty or service is held, on grounds of public policy, to be non-assignable. *Wells v. Foster*, 8 M. & W. 149; *Bliss v. Lawrence*, 58 N. Y. 442; *contra*, *State v. Hastings*, 15 Wis. 75. When, however, the salary, or part of it, has become due and payable, and the public official may get it on demand, it is difficult to perceive the grounds of public policy which forbid his assigning his right. "If the question had been whether or not the pay which was actually due might be assigned, I should have thought it like any other debt, assignable." Buller, J., in *Flarty v. Odum*, 3 T. R. 681. If such right be assignable, it would seem that it might be reached in supplementary proceedings; but the opposite doctrine seems to be established in Minnesota. *Roeller v. Ames*, 22 N. W. Rep. 177.

PROPERTY — VESTING OF LEGACIES. — Bequest in trust for testator's wife for life, and after her death the principal to be divided among the testator's children when they reach twenty-one, or, if any die, to their issue; and the income on each one's presumptive share, in the mean while, or such part as the trustees should think fit, to be applied to his or her maintenance. Some of the children died without issue before reaching twenty-one. *Held*, that there was not enough to show the testator's intention to vest the legacies before twenty-one. *In re Wintle*, [1896] 2 Ch. 711.

The decision is important as declining to follow *Fox v. Fox*, L. R. 19 Eq. 286. There is an accepted rule of construction, that whatever be the wording by which the principal is given, a gift of the interest vests the principal at once. *Clobberie's Case*, 2 Ventr. 342. But where the interest is given as maintenance there is still some doubt. *In re Ashmore's Trusts*, L. R. 9 Eq. 99. Now in *Fox v. Fox* a right to apply part only of the income did not prevent the court from deciding that the whole interest was given with a discretion as to how much to apply, and so the principal vested. It would certainly seem that the same wording should not prevent the court in the principal case from concluding that the whole income was not intended to be given. Nevertheless, while rules of construction originate as interpretations of intention, they are often to be followed as rules of law; and the meaning of words is decided with reference to their similarity to construed words, rather than with regard to their meaning as bare vehicles of intention. But as *Fox v. Fox* was not an unquestioned decision, the court thought

they might well deny that it had settled the rule. It remains to see whether that or the present case will establish a construction.

PROPERTY — WILLS — EXECUTORY DEVISE. — A testator devised real estate to his two grandsons in fee simple as tenants in common, but provided that "if either of them should depart this life without leaving living issue, then in that case the survivor, or the heirs of his body, shall inherit all the property and estate devised to both of them." *Held*, first, that each grandson takes a fee simple with an executory devise over contingent on a definite failure of issue; second, that the contingency upon which the devise over depends need not occur during testator's lifetime, but is equally effectual whether it occurs before or after testator's death. *First National Bank v. De Pauw*, 75 Fed. Rep. 775.

This result seems correct. The court state that their decision is opposed to a rule of law commonly held in England and the United States. This so called rule, which the court profess to disregard, may be briefly stated as follows. Where real estate is devised in such terms that the primary devisee takes an estate in fee simple, subject to a devise over on a certain contingency, such contingency is to be referred and confined to the lifetime of the testator, and is ineffectual unless it occurs during that time. There seems to be no necessity for such a rule except in a case where the executory devise is contingent on the death of the devisee in fee. In *O'Mahoney v. Burdett*, L. R. 7 H. L. 388, Lord Hatherley said, "The period to which the executory devise will be referred will be the period of the death of the first taker, unless there are directions in the will inconsistent with that supposition." See to the same effect, and in accord with the principal case, *Button v. Thornton*, 112 U. S. 526.

SALES — WARRANTY — PAROL EVIDENCE. — *Held*, that evidence of a parol warranty made at the time of a written contract for the sale of chattels is not admissible in evidence unless the writing construed "according to the circumstances under which and the purposes for which it was executed" appears not to have been intended as a complete statement of the contract between the parties. *Wheaton Co. v. Noye Co.*, 68 N. W. 854 (Minn.).

The court follows *Thompson v. Libbey*, 34 Minn. 374, in repudiating the doctrine that a warranty is a collateral agreement relating to a different subject matter from the contract of sale, and hence admissible whether the writing completely covers the contract of sale or not. This latter doctrine was suggested in *Chapin v. Dobson*, 78 N. Y. 74. But it guards particularly against a possible interpretation of *Thompson v. Libbey*, as supporting the strict view of *Naumberg v. Young*, 44 N. J. Law, 331, that the incompleteness of the written contract must appear on the face of the writing itself. The case agrees with *Durkin v. Cobleigh*, 156 Mass. 108, and, while it avoids the extreme ground of *Chapin v. Dobson*, it allows the court to put itself in the position of the parties in construing their contract.

TRUSTS — CONSTRUCTIVE. — One Crane, the holder of certain county warrants, surrendered them to defendant county in exchange for its bonds. These bonds he sold to plaintiff; subsequently they were declared invalid. On demurrer to plaintiff's bill, *held*, plaintiff is entitled in equity to enforce Crane's claim for a restitution of the warrants. *Irvine v. Board of Com'rs*, 75 Fed. Rep. 765.

Had Crane never parted with the ownership of the bonds, his right in equity to compel a restitution would be clear: "If a county obtain the money of others without authority, the law, independent of any statute, will compel restitution or compensation." Field, J., in *Marsh v. Fulton County*, 10 Wall. 676, 684. In fairness, it would seem that the obligation of the defendant county should not be diminished by reason of the transfer, and that, in the particular case suggested, the transferee should be entitled, in equity, to the entire beneficial interest in his transferrer's right against the defendant county. On authority, this cannot be regarded as well settled. *Parkersburg v. Brown*, 106 U. S. 500; *Chapman v. Douglas County*, 107 U. S. 360; *contra*, *Ins. Co. v. Middleport*, 124 U. S. 534. Technically, even in the case suggested, the transferrer should be joined as party plaintiff or party defendant.

It is held that when a debt, secured by a mortgage, is assigned, the assignee is entitled to the benefit of the security, though ignorant of its existence when the debt was assigned. *Jones on Mortgage*, 5th ed., § 817.

TRUSTS — INSOLVENCY OF BANK OF DEPOSIT. — Plaintiff deposited checks in the defendant bank, which, knowing its insolvency, credited plaintiff with them and forwarded them to a correspondent. The latter credited the checks to the defendant as cash. *Held*, that plaintiff might recover as a preferred claimant the proceeds of such checks as had not been so credited to the defendant at the hour of failure, but had no preferred claim to those credited before. *Bruner v. Bank*, 37 S. W. Rep. 286 (Tenn.).

There had been no settlement between the defendant and the correspondent involv-

ing any of the checks in question, and it would seem that the defendant was entitled to recover the proceeds of all. The plaintiff's right is not founded upon the ground that the moment of failure fixes the status of all the parties concerned, as the court holds, but upon the fraud of the defendant in receiving the deposits with knowledge of its insolvency. *Craigie v. Hadley*, 99 N. Y. 131. Where the defendant has obtained title to personal property by fraud, and afterwards disposes of the property, a constructive trust arises as to the proceeds, in favor of the former owner, so long as the proceeds can be traced. *American Co. v. Fancher*, 145 N. Y. 552. In the principal case, the defendant held in trust its claim against the correspondent for the proceeds of all the checks.

An interesting recent case in this connection is that of *City Bank v. Blackmore*, 75 Fed. Rep. 771, where, a deposit of a draft having been received with knowledge of insolvency, and forwarded to a correspondent, the latter applied the draft to reduce the indebtedness of the insolvent bank of deposit to the correspondent. After some delay, the draft was paid to the correspondent upon the express request of the plaintiff, the depositor. It was there held that, although the depositor would have had a right to rescind the contract of deposit on the ground of fraud by the bank receiving it, yet, having authorized the payment to the correspondent, plaintiff was estopped from denying that the title of the correspondent to the draft was good as against himself and the bank of deposit; therefore, the only ground on which the plaintiff could recover would be that the insolvent bank had been thereby enriched after the failure to the amount of the draft; but although the debt of the insolvent bank had been reduced by the amount collected, it was benefited only to the extent of the dividends to which the correspondent would have been entitled as a general creditor, and this was the measure of plaintiff's recovery.

TRUSTS—MISAPPROPRIATION OF FUND—ACTION AT LAW.—Money was deposited in a bank by a mother to the credit of herself or her son, as trustee, for the purpose of her support and burial. The son drew it out, and appropriated it to his own use, without the mother's knowledge or consent. Held, that the beneficiary might sue at law to recover the definite sum misappropriated, as money had and received. *Henchey v. Henchey*, 44 N. E. Rep. 1075 (Mass.).

Apparently, the court go on the ground that, even supposing a trust to have been created here, and accepted by the trustee, an action at law could be maintained against the trustee because his misappropriation was of a definite sum of money. This cannot be supported on principle. The defendant had accepted the trust, and it was still open. The mere fact that the subject of the trust was a known sum of money is not material. Therefore, the doctrine of the principal case might well be extended to cases where land, the subject of a trust, is sold by the trustee in violation of the terms of the trust, and an action at law ought to be allowed for the value of the land. But the law is clear, that in such a case recourse must be had to equity. *Norton v. Ray*, 139 Mass. 230. See *Jasper v. Hagen*, 1 N. Dak. 75.

REVIEWS.

A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW. Part I. DEVELOPMENT OF TRIAL BY JURY. By James Bradley Thayer. Boston: Little, Brown, & Co. 1896. pp. x, 186.

These one hundred and eighty pages are only a portion of the first volume of Professor Thayer's expected treatise on the Law of Evidence. This portion may well stand by itself, however, as an important contribution to legal learning. Just how important, can probably be fully appreciated only by one already learned in the subject. At the first reading, indeed, the novice will hardly realize how many vexed and obscure points of legal antiquities are here elucidated, simply because he will, if he have a real interest in the history of English law, find it such delightfully easy reading. Every serious historical scholar nowadays tries to get at the original sources, and cite them in his book. Unfortunately, however, very few of them have the art of making the original authorities tell their

own story in a connected and intelligible manner, as Professor Thayer has made his authorities tell the story of the development of the jury in England, — "its strange and wholly peculiar course for some six or eight centuries." For the present writer to criticise Professor Thayer's learning would be absurd. But there is something more than learning to be remarked in the book. The fact that an author is learned in his subject is hardly any guaranty, to say the least, that his book will not be dry bones and dust for the general reader, and a terror to the struggling student; for both of which classes of persons Professor Thayer has partly intended at least this portion of his book. Certainly they have to thank him for making his work not only thorough and accurate, but also lucid and interesting.

Of the four chapters composing this first part, the first gives some account of the older modes of trial, things hard to understand properly at the end of the nineteenth century, but here explained graphically, yet concisely. The three following chapters give an account of the trial by jury and its development, a subject practically of the greatest use in appreciating the true nature of our present law of evidence, and yet full of curious and interesting legal antiquities. The second chapter deals with the origin and establishment in England of the jury system; the third chiefly with the ways taken to inform the jury; and the fourth chiefly of the means of controlling the jury and correcting their errors. All of these chapters, in a less finished form, have appeared in the pages of the *HARVARD LAW REVIEW* (Vol. V., pp. 45, 249, 295, 357).

R. G.

GOVERNMENTS AND PARTIES IN CONTINENTAL EUROPE. By A. Lawrence Lowell. Boston and New York: Houghton, Mifflin & Co. 1896. 2 vols. pp. xiv, 377, and viii. 455.

This book deals with the practical workings of Continental governments in which party divisions necessarily play an important part. The author limits himself to those countries where for various reasons the system of two parties does not exist. He gives an outline of the structure and recent history of government in France, Italy, Germany, Austria-Hungary, and Switzerland; and prints in an appendix the constitution of each country. Of matters distinctively legal, mention may be made of the account of the relations between the administrative and the ordinary courts in France and Italy.

Mr. Lowell, however, views the institutions from a governmental and political, rather than a legal standpoint. He shows how in France the subdivision of parties has rendered the ministers, who are responsible to the deputies, practically helpless, and subject to frequent changes as party coalitions shift; while in Italy the same cause has made politics rather a contest of personal cliques than of principles. In Germany the central figure is the Chancellor, whose independence of the legislative assembly reduces the parties to a position comparatively unimportant. In Austria and Hungary the bitter race feeling presents the most serious problem, a difficulty which the latter country has solved by concentrating the power in the hands of the Magyars. The unique relations of these two nations, which, though unlike in race and naturally rivals, are forced by pressure from without to stand united, form the subject of an interesting chapter. In Switzerland, the "referendum" and the "initiative" naturally attract our attention, as furnishing a basis for possible changes

in our own system. The former, Mr. Lowell thinks, has worked well there, though probably not adapted to our conditions; the success of the latter he considers doubtful even in Switzerland.

The author has thus collected in an attractive form a great amount of information not otherwise accessible in English, and his keen analysis of causes and effects, as well as his grasp of present conditions, makes the book of value not only to students of the theories of government, but to any one who wishes to follow current European events intelligently.

C. S. T.

THE LAW OF EVIDENCE IN CIVIL CASES. By Burt W. Jones, of the Wisconsin Bar, Lecturer on Evidence in the University of Wisconsin. San Francisco: Bancroft-Whitney Co. 1896. 3 vols. 18mo. pp. xxviii, 2198.

Mr. Jones has produced three excellent little volumes, which it is safe to predict will be speedily appreciated and used by the profession and by students as well. He is concise, but with no sacrifice of clearness, while he has a faculty of expressing himself in a manner peculiarly easy of comprehension. The primary object has been "to furnish a convenient text-book for trial lawyers, stating tersely the rules of law which govern in the trial of civil cases." The cases cited are numerous, though a full collection of authorities is not attempted as it would be impracticable. There is no very extended discussion but there is quite sufficient for practical purposes; enough to relieve the bareness of mere statement of rules. A key to exhaustive inquiry is furnished by the references to articles in periodicals, which are valuable but ordinarily not easy to find because of the necessary limitations of an index pure and simple.

The author shows a clear grasp of his subject, but he does not attempt to supplant long used terms by more accurate ones. His indication of their exact scope may often save a slip, however, while the information is still in a workable form. On page 23 it is said, "Yet it may well be urged that all of these so-called conclusive presumptions may be more properly described as rules of law than as conclusive presumptions of law." Had this been clearly realized, the form of a presumption would never have served as a cloak for judicial legislation which the judges were unwilling to avow.

While it has been impossible to test these volumes exhaustively, they appear to be singularly free from flaws. In treating of the use of writings on cross-examination, however, the writer does not point out the distinction between proof of contents and questioning as to contents for purposes of impeachment only. §§ 232, 850. The general rule, founded on *The Queen's Case*, 2 Br. & Bing. 284, is given, to the effect that the writing must be introduced and its contents proved in the ordinary way before the witness can be questioned as to its contents. The sound rule, supported by *Randolph v. Woodstock*, 35 Vt. 291, 295, is to allow the question whether a different statement has not been made by the witness in a letter, and only require proof of contents in the ordinary way if the answer is not accepted. As the value of such a course is apparent, it might be found expedient to raise the question in a jurisdiction where it is open. In § 232, however, it is noticed that the rule has been changed in England by statute. It is probable, therefore, that the author did not consider it wise to take up the question, interesting as it is as a matter of principle.

K. S.

A TREATISE ON THE LAW OF CIRCUMSTANTIAL EVIDENCE. Illustrated by numerous Cases. By Arthur P. Will, of the Chicago Bar. Philadelphia: T. & J. W. Johnson & Co. 1896. pp. xvi, 555.

The subject of circumstantial evidence does not warrant separate treatment at such length. It is not surprising, therefore, to find much in these five hundred odd pages that would naturally be looked for in a general work on evidence. The author devotes considerable space to the subject of confessions, because, he says (p. 112), the rules as to their admissibility "are of great moment in their application to such particulars of circumstantial evidence as are in the nature of confessional evidence." The net result for his purposes seems to be a demonstration at unnecessary length of the unreliability of all evidence of this nature.

A feature of the book is the statement of a large number of illustrative cases; indeed, this is carried so far that it would seem as if it were considered a good substitute for discussion. As an exhaustive collection of the cases is not attempted, the book cannot take the place of a digest, while for the student the full reports are more valuable, unless the statement of cases is accompanied with analysis. It is to be noticed, however, that the author has selected for his illustrations many very recent decisions.

The failure of this method of treatment is very apparent in the section dealing with "Evidence of Previous Attempts and other Crimes" (p. 57), and again in the chapter on the "Presumption of Innocence." On page 234 it is said, "The presumption of innocence, though not strictly evidence, yet has, to the extent it goes, the effect of evidence, — sufficiently so in a doubtful case to turn the scale in his favor and produce his acquittal." It is strange that the cases of *Coffin v. U. S.*, 156 U. S. 432, and *Cockran v. U. S.*, 157 U. S. 286, are not cited here. While one is ready to agree that this so called presumption is not evidence (see 9 HARVARD LAW REVIEW, 144), further light on this troublesome question would be welcome. In the unsatisfactory condition of the authorities, that anything of value is to be derived from the statement of illustrative cases alone is not to be expected.

E. S.

THE TORRENS LAW AS TO TITLE REGISTRY IN OHIO, including Interpretation, by Members of the Commission who drafted said Law for Ohio, as to its Meaning, Application, etc., with Brief History of Land Title Registry Laws. By Florien Giauque. Cincinnati: The Robert Clarke Co. 1896. pp. 58.

This little pamphlet contains the full text of the title registration law adopted in Ohio, which will become operative in January next. Appended are letters from the commissioners who framed the act, explaining briefly the changes made by the legislature in the draft submitted by them. This act is of interest because a judicial determination of title is provided for before registry. In this it is a departure from the original Torrens system, which for various reasons, among them delay and expense, the Illinois commissioners were unwilling to adopt. The method of determining title which they did provide, however, was the feature of the act declared unconstitutional by the Illinois court.

E. S.

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I. — THE PLEDGE-IDEA: A STUDY IN COMPARATIVE LEGAL IDEAS.

THE place in legal science of the subject commonly spoken of as Comparative Law is not easy to settle. Its settlement depends more or less on the analysis and grouping that one adopts for the various parts of legal science as a whole. Leaving for another occasion the question of classification from the point of view of jurisprudence, it has seemed worth while to attempt to illustrate here the significance of one view of the scope of the subject. The choice of topic for illustration was determined merely by casual circumstances creating an interest in this particular topic, and by the accessibility of material.

The pledge-idea — briefly expressed, that of collateral security — is familiar enough in modern law. But it is distinctly an idea of modern times. The various known systems of law recognize it with various degrees of definiteness, according to the social stage which their development has reached, or had reached when arrested. The idea familiar to us has grown, in the history of the law, out of a very different one. The attempt here will be to go back to the primitive notion of that transaction, and notice its development and the traces it has left on the law as handed over to us in its later stages.

To realize the root notion of the transaction, we may put ourselves in the place of the primitive traders and try to reconstruct the conditions of their traffic. In the ordinary case of barter between passing travellers, or at the monthly or half-yearly markets, A will

find what he wants in B's hands, but the equivalent which A has to give may be either not to B's liking in kind or not of proper value. They must and will make a provisional trade or payment, B taking something of A's that will induce him to sell, but A having the privilege of substituting later an equivalent not now available. So, too, when A has injured B, and B seeks self-redress by his own hands, A may be able to buy off B by handing over whatever he has that is available, but subject to the right of subsequent substitution of something more nearly an equivalent. In short, all transactions of the sort must be cash transactions, *because there is no credit*. We know that the absence of credit is a feature of the times, both from the ethnological study of primitive surviving communities, and from the fact that credit presupposes a use, legal or moral (customary), of the force of the community, which is wholly inconsistent with the private redress notions of primitive times.¹ One must try, moreover, to realize this absence of credit subjectively; i. e. to remember that the seller or claim-holder is not willing to go away from the spot leaving the matter unsettled, and trusting to (crediting) the other's future action; he is going to get something then and there in satisfaction, and the best allowance that the would-be borrower or the tortfeasor can obtain is that the settlement shall be provisional in his favor, i. e. the *res* given over shall be open to future redemption. The cardinal feature of the transaction is, then, that the party whom we should call the creditor goes away with nothing left to claim, though the (as we call him) debtor has a right of redemption against the other.

We shall be better able to appreciate the primitive state of mind if we remember that in at least four important bodies of law and language the primitive word for the ideas of "pledge," "bet" (or "forfeit"), and "promise," was substantially the same. In the Scandinavian we have *vaed*, *ved*.² In the Germanic we have *wetti*, *wette*, *wedde*, *vadi-um*, *guadi-um*, and (by sliding the *di* into *ji*) *wage*, *guage*, *gage*.³ In the Latin we have *pignus* in the first two

¹ Goldschmidt, *Handelsrecht*, I, 20, 29: "In its first stages all circulation of goods is done by barter. . . . In the Germanic tribes, in North Germany even into the 15th century, trade on credit is scanty." Compare the following recital of 1150 A. D.: "Vinum mihi vendidit. . . . Non habens igitur admanum pecuniam, census quendam . . . in vadimonio ei deposui" (Kohler, 120). Compare the ways in which both Franken (213) and Heusler (II, 131) posit this.

² Amira, *Nordgermanisches Obligationen-recht*, I, §§ 28-31; II, § 22.

³ Meibom, *Deutsches Pfandrecht*, 24; Val de Lièvre, *Launegild und Wadia*, 97 ff.; Diez, *Wörterbuch der Romanischen Sprachen*, s. v. Gaggio. Our modern word "for-

meanings, and from the same root (πήγνυμι) *pango*, *pag*, *pact-um*, in the third meaning. In the Greek, the verb-stem *θετ-* (put) has all three meanings.¹ It is not merely that the words for the three ideas were the same; it is much more than that; *there was only one idea* for what we now distinguish as three. That is, the transactions which we now distinguish as pledge, forfeit, and promise, were then not distinguished at all, and only differentiated themselves later and gradually. We may get some slight notion of the unity by noticing how to-day we ourselves say, "I pledge you my word," and "He pledged his watch" (thus using one word for the first and third notions); or, "I stake my honor upon it," and "He held the stakes" (thus using one word for the second and third notions); or how the Germans say "pfand" for the first notion, and "pfandspiel" for a game of forfeits. But of course with us the ideas are still different, though the words may coincide; while with the primitive speaker the one root represented the same general notion. We can, however, describe the past only in terms of our own notions; and, in fixing on the idea which most nearly represents to us the essence of the primitive notion, we find the second one to be the chief and suggestive one, i. e. "bet," or, more closely, "forfeit." The "forfeit" idea is the important one, because, first, out of it the other two seem to have developed, and, next, it brings out most clearly the contrast between the original and the modern idea of the transaction which we now call "pledge." The "promise" idea developed by transferring the moral emphasis from the fact that the transaction was settled to the fact that it was only provisionally settled; the "forfeit" itself was used as a mere form, and was subordinated in idea to that which it came to mark, i. e. the debtor's duty.²

feit" (*vorvedja*) preserves closely the *ved* and the *wette* form, as does "bet" (*pact* the Century Dictionary) less clearly; while "wager" follows the *guadium* development. In Scotland, in the 1600's, *wed-setten* was still the generic word for a mortgage; Skene, *De Verborum Significatione*, s. v. *Vadium* (1641). Curiously enough, there is a similar coincidence in the verb used, which is usually a synonym of "put"; *saetia* in Gothic and Icelandic, *setzen* in German, *ponere* in Latin, *τίθημι* in Greek, *ire* in Japanese.

¹ See the references *post*, under Roman and Greek Law.

² The connection of the *wadium* with the promise idea is no part of the present subject; but a reminder of the probable features of its development will perhaps make more clear the unity of the primitive root-notion. We may assume (though this has been disputed) that it is the infra-judicial *wadium* promise which was first recognized, and therefore is the process to be explained. This puts before us the case of a defendant against whom judgment is given by the assembly; he finds himself ordered to pay.

On the other side, the "pledge" or "collateral security" idea developed by a similar transfer of emphasis where the *res* handed

How shall he pay? There is no credit; present satisfaction, provisional or final, is all that creditors of that time take. There are three primitive ways of giving satisfaction. One is by handing over property; this is simple enough. Another is by self-surrender, working out the debt if possible. A third is by handing over the body of a relative; this is natural enough from the debtor's point of view, such is the solidarity of family responsibility; from the creditor's point of view it is equally natural, for his ultimate hold on the family property or the corporal servitude of the surety (*geisel*, *pleige*, *fidejussor*) is ample; and it is even a question whether this payment by corporal surety was not the most natural early form. At any rate, it would be so where a judicial sentence of the assembly was to be satisfied; for property enough the debtor has probably not with him, and his own freedom he needs in order to collect what will pay his creditor. He therefore offers one or more of his relatives as provisional satisfaction. A common form (now accepted as authentic) for this was: the debtor hands a stick, a glove, etc., as his *wadium*, to the creditor, bringing forward at the same time the *fidejussor*, and the creditor passes the *wadium* to the *fidejussor*. The problem is to explain this process. A question which all the theories have to answer, viz. how the *wadium* came to be a mere valueless article, is here answered by pointing out that the *fidejussor* was the real payment, — not a surety in our modern sense, but the substantial substitute for present payment, and the real reliance of the creditor. Another question next occurs: Why have the stick-*wadium* at all? Why not merely hand over the *pleige* without the other formality? In fact, we do not find the intervening stick-*wadium* in all primitive laws, — not in the Roman, for example, although we do find the human pledge. But there seem to be two good reasons which account for it in the Germanic law. One is, that, as the typical transaction of provisional payment in every-day life involved the handing over of some *res* on the spot to the creditor, it was entirely natural that this part of the process should persist in form at least. Another is that the handing of the *wadium* to the *pleige* made it possible for him to get redress against the original debtor if he subsequently left the *pleige* to suffer. The debtor could not be thought of as subject to a levy from another unless the other had some mark of a creditor; and the surety would be content with a *wadium* of nominal value (as the creditor would not), because family feeling would compel the debtor to redeem. Thus, the *wadium* was handed to the creditor as a formal, though worthless payment, freeing the debtor; then the *pleige* surrendered himself to the creditor, and thus *liberavit wadium*, taking it himself. In later times, the personal surety dropped out of the transaction, because it was no longer in harmony with social conditions, and because credit had developed, while the *wadium* stick or glove remained associated in form with the idea of plighted faith.

Three facts in particular seem to narrow down the explanation of the process to something like the above: (1) The *wadium* was the regular and proper accompaniment in judgment promises, but was casual only in extra-judicial promises, — indicating the former as the home of the form; (2) the debtor *had* to give a substantial substitute for payment, either property or self or relative; he was primitively never let off with a mere form, — indicating that the *wadium* would never have been allowed to become a *res* of trifling value if it had not been accompanied by other sufficient value; and (3) in the judgment-promise with *wadium* the *pleige* always accompanied it, indicating that it was the presence of the substantial *pleige* which allowed the *wadium* to become of mere nominal value, and paved the way for its becoming a conventional form.

The foregoing attempt to restate the origin of the *wadium* promise is of course based

over remained of substantial value; i. e., the idea that it was provisional led to the disappearance of the "forfeit" idea; the original claim became ultimately the measure of the parties' rights, and therefore the debtor could no longer throw the creditor exclusively on the *res* for satisfaction, nor could the creditor keep it all in case of default. It is this progress from the idea of forfeit to the idea of collateral security which we are to keep in mind as the general feature of our present subject; and we may now proceed to the evidence that this was in fact the course of development of this legal idea.

The varied aspects of the subject and the richness of the material make it necessary to keep within narrow bounds. Legal ideas are so interrelated that many subordinate and troublesome topics must be here disregarded. The usury-prohibition and the history of interest have something to do with our subject, but will not be considered, except as affecting the *vifgage*. Furthermore, the history of judicial execution for debt, which has by many students been supposed to explain the origin of the hypothec, and the source of the institution of rent-charge, which in some periods is almost inseparable from our subject, must be ignored, except where necessary in dealing with the hypothec. Discarding also all other topics connected with the history of real security, it is enough to trace the main idea, and to distinguish the various transactional forms that throw light on it. The topics will be: —

I. The Forfeit-idea, in general, as the forerunner of the Collateral-Security idea. II. The Hypothec (pledgor's possession) as distinguished from the ordinary Pledge (pledgee's possession). III. The Sale for Purchase, as distinguished from the Pledge. IV. The *Vifgage* as distinguished from the Mortgage.

After noting the development of the idea in the legal systems which furnish the richest materials for examining different stages of the law, the Germanic and the Scandinavian, we may then examine what evidence there is in other systems, — Jewish, Moham-medan, Egyptian, Chaldean, Slavic, Hindu, and Japanese; leaving to the last the Greek and the Roman, as presenting peculiar diffi-

only on the material that has been published by the various workers in that field (Sohm, Brunner, Stobbe, Heusler, Franken, Valde Lièvre, Esmein, Wodon, etc.); but none of the theories hitherto (except Heusler's) seem to have taken into account the original unity of the *wed*-idea, from which the three branches developed, and a restatement from that point of view seems to explain certain facts otherwise unaccounted for. The above statement is substantially Heusler's.

culties, and the French, as involving an acquaintance with the Roman.¹

GERMANIC AND SCANDINAVIAN LAW.²

I. *The Forfeit Idea, in general.*

If the idea above described was that which marked the transaction of primitive times, — the idea of forfeit or provisional satisfaction, — what would be some of the legal consequences in the relations of the two parties? Certain main features would surely be found.

A. 1. If the pledgor chooses not to pay (redeem), the pledgee

¹ Until HEUSLER, the true significance of the Germanic pledge law, in spite of much research and discussion, seems not to have been appreciated. In 1867, von Meibom had established the chief data so as to clear away most previous errors of fact; but he saw in the transaction only an "exchange," and this prevented him from understanding the complete relation of the facts and their historical changes, and it particularly misled him as to the hypothec. In 1882, von Amira clearly worked out the chief data for Swedish Scandinavia. But Heusler (in his *Institutionen*, 1886) was the first to advance the forfeit-theory for Germanic law, and to state all its bearings, and his analysis (though accompanied by little evidence) is irresistible in its plausibility and its harmony with the evidence elsewhere abundant. The statement in the following pages is substantially an adaptation of Heusler's theory; though the mode of presentation is different, and his theory is not to be held responsible for all the arguments here advanced in its support (especially as to the relation between the *auflassung*-clause and the evasion of the duty to restore the surplus, which does not seem to have attracted his attention). Almost all of the passages quoted in illustration have been culled for the present purpose from earlier publications whose authors knew nothing of the forfeit-theory.

In 1895, von Amira (in his second volume), writing in the light of Heusler's published view, found it amply confirmed and proved it to be the key to the West Scandinavian development. But outside of these two fields, the forfeit-idea as the key to the history of the pledge-idea seems never to have been advanced for any system of law, not even for the Roman; and it will be the purpose of a later article to test its validity for other systems.

² The references that follow are to these works: 1855, *Stobbe*, *Deutsches Vertragsrecht*; 1875, *Id.*, *Deutsches Privatrecht*, II. 1; 1865, *Neumann*, *Geschichte des Wuchers in Deutschland*; 1867, *v. Meibom*, *Deutsches Pfandrecht*; 1867, *Sohm*, *Prozess der Lex Salica* (tr. Thévenin); 1875, *Id.*, *Recht der Eheschliessung*; 1873, *Schulte*, *Lehrb. der Deutschen Reichs- und Rechtsgeschichte*; 1874, *Endemann*, *Roman-Kanon. Wirthsch.- u. Rechtslehre* [really, *Die Wucherlehre*]; 1877, *Val de Livra*, *Launegild und Wadia*; 1879, *Franken*, *Französisches Pfandrecht im Mittelalter*; 1880, *Brunner*, *Rechtsgeschichte der Römischen und Germanischen Urkunden*; 1892, *Id.*, *Deutsche Rechtsgeschichte*; 1881, *Weisl*, *Deutsches Pfandrecht bis zur Reception*; 1882, *Köhler*, *Pfandrechtliche Forschungen*; 1883, *Esmein*, *Études sur les Contrats dans le très-ancien droit français*; 1885-86, *Heusler*, *Institutionen des Deutschen Privatrechts*; 1893, *Wodon*, *La Forme et la Garantie dans les contrats francs*; 1882-95, *v. Amira*, *Nordgermanisches Obligationenrecht*: I. *Altschwedisches R.*; II. *Westnordisches R.*

cannot compel him; he looks exclusively to the *res* for payment; it *is* a provisional payment. Hence: *a.* the pledgee cannot sue the pledgor, inasmuch as the *res* is his payment; *b.* the pledgee has no redress if the *res* perishes by accident; *c.* the pledgee has no redress if at the maturity of the period the *res* has become less in value than the original claim, or on being sold leaves a deficit.

2. The pledgee, while thus having the detriment arising from the *res* being a payment, has also the advantage; for on default the *res* becomes his *in toto*, i. e., he is not bound to restore the surplus value.

B. Along with these features, but not peculiar to this transaction, is another, whose steps of development have to be noted in order to distinguish them from the preceding features, and to explain later problems, i. e., the feature of defect of absolute title, due to the fact that the transfer of the *res*, being provisional only, lacked the *auflassung* or final abandonment of right by the pledgor. Even after default at the time appointed for redemption, the pledgee's title still has this defect; and while the other features are passing into their later stages, we here find the pledgee successfully endeavoring to remedy this defect; it is this process that has to be carefully distinguished from the others.

To take up the evidence.

A. 1. *a.* No personal action for the pledgee against the pledgor.¹ In the first place, the documents usually do not (as our modern ones do) mention any obligation of debt as arising from or accompanying it;² e. g. "we have pledged the manor of Blackacre for 100 marks." Furthermore, the early documents expressly speak of the transaction as a "payment," i. e. extinction of a claim.³ Finally, some laws particularly mention the pledge's inability to treat the claim as surviving.⁴ Strong light is also thrown by the

¹ Meibom, 274 ff.; Heusler, II, 132, 133; Kohler, 99, 100, 137.

² Meibom, 276.

³ "Cum in *solutionem* dictarum 500 marcarum . . . tum in *recompensationem* damnorum . . . castrum . . . pro 1000 marcis *obligavimus*" (Meibom, 278); "pro ipsa causa solidus tantus in pagalia mihi dare debueras, quos et in praesenti per wadio tuo visus es *transolsisse*" (Wodon, 122); "per suum wadium ipsas res . . . reddidit" (Id. 108), and of course the phrases "per wadium meum componere" and "cum uno wadio emendare" were common ones for the process of payment by *wadium*; "ducentas libras Holiandenses ad [dotem] dicte Aleidis promissimus conferendas, et *pro solutione* dicte pecunie eidem obligavimus decimas segetum et minutas decimas" (Kohler, 52; this is as late as 1269).

⁴ "When one man sues another for a sum of money and the other answers, 'I deny him not the sum which he claims, but he has a pledge from me [for it],' . . . the former

analogy of the transaction which we now call personal suretyship. The *fidejussor* (as already mentioned) comes to the front in the development of the legal promise through the *wadia*, and the notable thing about his function is that the *wadia* is first given, and then the giving of the *fidejussor* pays and frees the *wadia*; as in the much discussed passage of Liutprand, 37 (Lombard): "si wadium dederit, et antequam eam per fidejussorem liberit," etc. Furthermore, the whole notion of the *fidejussor* was that he freed the debtor, and stepped into his place just as a *res* would; thus, in the Frankish law, the debtor "liber erit, si fidejussor moritur"; the creditor could not sue the original debtor,¹ and it was only in later times² that he had his choice between the debtor and the *fidejussor*; while the question whether he must first seek the debtor before suing the surety is an essentially modern one. Again, the fact that, in later times, when other debts were inherited, the liability of the *fidejussor* was not,³ (witness the maxim, "le pleige mort, la pleigerie meurt,") is apparently best explained by the notion that his person was simply paid over to the creditor, like a *res*, in liberation.⁴

shall use it [the *res*], and the latter shall remain harmless, and the former shall sell the pledge, as is right" (Bayr. Landr. 240; quoted Meibom, 422). A Lombard commentary on the following formula, "Cujus placiti vadimonia (per usum) debent esse cum fidejussoribus tacita pena," says: "[If the debtor does not come to trial as thus pledged,] non est intelligendum . . . is rem unde agitur debeat amittere; immo . . . intelligendum est quod penam wadie debeat solvere" (Val de Lièvre, 142); and the pains thus taken by the later scribe to assert that the debtor could not get off by letting his pledge be forfeited show that the contrary notion had prevailed and was to be combated.

¹ Esmein, 85; Heusler, II, § 126. Sohm (Eheschliessung, 38, n. 38) offers the forced explanation that "the surety, because he last received the *wadium*, is thus the first in liability"; but it is clear that he admits in effect the fact of the liberatory function, for he had already said (La Procédure de la Lex Salica, ed. Thévenin, App. I. and § 5): "La contrainte procédurale, à laquelle donne lieu le refus, s'exerce principalement contre le fidéjusseur, et non contre le débiteur"; when, moreover, he says, "Le débiteur principal reste lié vis-à-vis du créancier; mais l'action du créancier est dirigée contre le fidéjusseur," the first statement can hardly be correct if the second is, and the law indorses the second. As late as the Schwabenspiegel (258 b, quoted in Stobbe) we find a rule that if a pledged animal dies, the creditor has no claim for the debt, *unless there is a surety*; which shows how the surety was assimilated to a *res* substituted for the claim.

² Stobbe, 124-126.

³ Esmein, 145; Stobbe, Vertr. 132, 195.

⁴ Another significant notion of the Middle Ages is the "tavern right"; by which the tavern keeper was obliged to set out drink not only for money offered, but for pledges offered, provided they exceeded the drink value by a certain ratio; the pledge is payment, and the tavern keeper "may re-pledge it for the claim, and shall notify the debtor that he may redeem it, *if he wishes*, at the place where it has been re-pledged" (Kohler, 13).

The progress to the later stage, in which the liability is recognized as independent of the pledge, came through express contract, i. e. if there had been an express promise (*gelobet*) of liability, the *res* became merely collateral to that.¹

1. *b.* No claim for the pledgee if the *res* perishes by accident. This feature was long a matter of dispute; but the work of Meibom and of Heusler has explained all the difficulties, and settled beyond a doubt the question of fact.² The fact is equally clear in Scandinavian law.³ This rule points clearly to the notion that the *res* is a provisional payment. If the pledgee had been merely compelled to deduct its value from his claim, this result might well have been explainable on some theory of a counter-liability on his part as bailee of the *res*. But the treatment of the *res* and his claim as equivalent shows clearly how the *res* is regarded as measuring the claim as representing it, as having in effect paid it by forming the sole resort of the pledgee for satisfaction.⁴

b'. The next stage is reached by the aid of an express contract;

¹ In the later records, the independent survival of the debt is of course fully recognized, although this does not necessarily indicate that the creditor could look to the pledgor personally. Roughly, there are three stages: (1) to pay off, *per wadium componere*, the pure forfeit-idea, and no notion of debt survival; (2) to pay provisionally, the debt surviving, but the *res* being the creditor's sole resort for payment; (3) to secure in a purely collateral way. See *post*.

² Significant passages; Sachsenspiegel, III, 5, § 5: "[If a pledged animal dies without the creditor's fault, the creditor] ne gilt es nicht; he hevet aber verloren sein gelt, dar it ime vor stund, [for it stood in its place to him]"; Prague Rechtsb. 166: "Er gilt sein nicht; er hat ober verloren sein gelt"; Ledebach Privil.: [If a pledged house burns down,] *si vero domum suam redificare [sc. pledgor] non voluerit, quod remansit de igni cum possessione dat illi cujus vadimonium prius fuerat, et sic se absoluat; creditor postea, quantumcumque debiti superest, nihil amplius ab eo extorquere, secundum nostram justitiam, possit*" (Schulte, 500); Statuta Susatica: "... relinquet creditori reliquias incendii vel ruine et fundum pro pignore, sic creditor *nil amplius potest petere*" (Kohler, 114). The passages are collected in Meibom, 283, 426; Kohler, 19, 111-115; Heusler, II, 202; Weisl, 61; Stobbe, Vertr. 263-5. "Ein Haus, ein Brand" was a proverb implying that the risk of fire was on the pledgee; Chaisemartin, Proverbes et Maximes du droit germanique, 223 (1891). For an explanation of the difference between this risk of loss of his claim through provisional payment and the creditor's burden of risk as a bailee, see *post*.

³ Amira, I, 213; II, § 22.

⁴ This notion occasionally finds express mention in the documents: "Verloren se [pledgee] aver edder ere ammechtude dat slot [castle] van wanheude edder van unlukke, des god nicht en wille, so scholden se ere gheld in *deme slot* unde *we dat slot* verloren hebben" (Kohler, 114); in another document the pledgor promises to help the pledgee recover the castle if he should be spoiled of it, but if the castle should not be recovered, "so scholet ze [pledgee] dat ghelt verloren hebben, *dar id en vore satet was* van uns, unde vor der scholet ze dar nene nod umme lider" (Kohler, 114).

i. e. the pledgee can claim nothing, *unless* the debtor has otherwise promised (in the common phrases, "ere vorwort ne sy anders," "ire gelovede ne stunde [settle] den anders"). This is the first step towards getting away from the primitive rule; the step being taken, of course, at different times in different communities.¹

b". Finally, that which at first needed to be expressly provided for in the contract becomes the general rule without express provision, and the accidental loss of the *res* does not bar the pledgee's action.² When we appreciate how natural and established in earlier times the notion was that the creditor could claim nothing though the *res* perished, we see how necessary it was for later law-givers and custom-records to mention expressly that the claim could be maintained; and we are the more willing to concede that wherever, in a legal literature of scapty sources, we find such an express mention of the modern rule, it indicates that there was a time when the contrary principle prevailed.

1. c. No claim for a deficit. If at the time for redemption the *res* is not redeemed, and proves deficient in value, by deterioration or otherwise, the pledgee has no redress; the *res* is his forfeit, and he cannot look beyond it for payment.³ The significance of this rule for the forfeit idea seems clear.

c'. Here, also, the next stage towards the modern rule is reached through an express promise to pay the deficit; and it is this stage that is best represented in the town laws and customs of the late Middle Ages.⁴

¹ The just-quoted passage from the Prague Rechtsbuch ends: "jr gelubde stee wissen in den andere"; so also the Sachsenspiegel passage, "ire gelovede stunde den anders." A clause in a document of 1334 reads: "Wore ouch daz se [creditor] das . . . hus verloren in unseme . . . dinste, so solde wir [debtor] en er phenninge weder geben" (Stobbe, Vertr. 269). The passages are collected in the following places: Weisl, 61; Meibom, 290; Stobbe, Vertr. 269; Heusler, II, 204; Kohler, 115, 315; and for Scandinavia, in Amira, I, 213; II, § 22.

² Meibom, 290; Stobbe, Priv. 625, Vertr. 256. In this stage by express agreement the risk is often thrown back on the pledgee; thus: "and if any harm comes to the castle [pledged,] of whatever sort it be, that shall they [pledgee] not demand of us [pledgor] or our successors, . . . nor have any claim or action therefore against us in any way" (document of 1435, Kohler, 332).

³ Lübeck Stadtrecht: "Brickt eme ock, dat is des schade deme dat erve vorpandet is [But if it falls short for him, that is the loss of him to whom the land is pledged]" (Stobbe, Vertr. 261). The passages are collected in the following places: Meibom, 280; Weisl, 61; Schulte, 500; Stobbe, Priv. 271, 623; Vertr. 260; Neumann, 202; and for Scandinavia, Amira, I, 213; II, § 22.

⁴ Example of a special clause (Hesse, 1248): "eo pacto, ut si quid defuerit in predictis, . . . supplere plenarie teneamur" (Meibom, 295); of a judicial decision: "Gebricht

c'. Later still we find the next step taken, and the law expressly authorizes pledgees to collect the deficit from their pledgors.¹

2. *a*. No return of surplus by the pledgee. If the *res* is really a forfeit, standing for and in place of the claim, the pledgee gets the benefit as well as the detriment, and if, when the pledgor fails to redeem, the *res* is worth more than he would have needed to pay for redeeming, the pledgee cannot be looked to for the surplus; and this is equally true whether the *res* is merely kept by the pledgee or is sold and turned into money.² *a'*. The transition comes first through a contract clause requiring restoration of the surplus;³ and, *a''*, then this settles into the fixed custom.⁴ It seems (where careful chronological tracing is possible) to have come first for personal property.⁵ Moreover, the notion (2 *a*) that the pledgee need not restore the surplus seems (often or usually) to have suffered the change earlier than the correlative notion (1 *c*) that the pledgor need not pay the deficit;⁶ perhaps the explanation of this is, first, that the pledgee usually took care

ihme aber etwas daran, er soll es missen; es were dan dass ihme seine volle bezahlung gelobet und zugesagt worden" (Stobbe, Priv. 624); of a popular customary (Sachsenspiegel, later form): "If the debtor acknowledges that he has promised [gelobet] along with the pledge, the creditor shall be helped out [by payment] over and above the pledge if it falls short; if the debtor affirms that he has not promised along with the pledge [to pay the deficit], the Jew must rest content with his pledge" (Meibom, 282). For collections of passages, see the citations of the preceding note.

¹ See the same citations. The development is neatly seen in the successive revisions (quoted Meibom, 424) of the Hamburg Stadtrecht. The text of 1270 read: "Umbreke eme ok wat, de schade is *syn*"; while the revision of 1292 left it, "Untbreke eme och wat, dhat sca eme *dhe volden des dat goet oder dat erve was*."

² This we notice most clearly in the form of the judgment which the creditor (as explained later) obtained. There is no talk of returning the surplus value; it is simply ordered that "he take the pledge to his own use and be from the other man quit and free"; it is his forfeit, and its value is immaterial. The authorities are found in Meibom, 330; Heusler, II, 204; Schulte, 500; Stobbe, Priv. 270, 627; Vertr. 260; Kohler, 137; and for Scandinavia, Amira, I, 203, 213; II, § 22.

³ Example of a document clause (Hesse, 1248): "eo pacto, ut . . . si quid superest, aut restituat," etc. (Meibom, 295); for other passages, see the citations of the preceding note.

⁴ Lübeck Stadtrecht: "Wat dat erve [land] mer gelt, wan dit it vervolget [forfeited] is, dat schal he ime wedder geven" (Stobbe, Vertr. 261); Ditmars Landrecht, 1541 A. D.: "Wunneth he averst mit darumme, also he gelaveth heft; dat overighe gheldt schall he dem rechten sackwolt wedergeven" (Neumann, 202). In the Stadtrecht of Frieberg we see another shade of transition: "Was die pfant bezzer suit, wi si sten, daz mag he behalden; *he mac iz ouch widergeven ob er wil*" (Weisl). For authorities, see those of the preceding note, and Neumann, 204; Weisl, 25, 39.

⁵ Amira, I, 203, 213.

⁶ Amira, I, 205, 213; II, § 22; Stobbe, Vertr. 260; Meibom, 331.

to obtain a *res* much in excess of his claim, and hence the case of a surplus was forced oftener than the reverse case upon the community's thoughts; and, secondly, the fairness of the pledgee's returning the surplus could be worked out on the theory merely of the pledgor's right to redeem (i. e. if he had paid cash to redeem, he would have got back this surplus value; hence, why not assume a redemption *per rem ipsam*, and give back the surplus, leaving the pledgee no worse?), while the pledgor's duty to make up a deficit could not be appreciated until the independent survival of an obligation, alongside of the pledge, had been fully recognized in thought.

These four features, then, just described, seem to mark as clearly as anything can the theory of the transaction of *ved*, *wette*, *satzung*, as that of a redeemable forfeit or provisional payment. In all four there is a gradual change to the notion of modern times which looks on the debt as continuing in full force, and the *res* as handed over purely as an auxiliary resource for the creditor.¹ We are not to seek in the law of pledge itself for the reasons of the change. The change came about as soon as the community recognized credit widely and developed varieties of obligation and forms of action for them; but this was an independent process. As soon as there were many ways of creating a principal debt, and of enforcing it without a *wette*, then it could be seen that the *wette* need only be collateral and not substitutive. But this would take time to see, and meanwhile the old traditional rules of *wette* would persist by mere inertia. Thus it is that we find some of them

¹ It should be noted here, as to the feature 1 *a* above, that the views of Heusler and von Amira differ. The view of the latter (I. 206) is that after receiving the *ved* the creditor has no claim (*forderungsrecht*) of any kind left against the debtor; and this is also the doctrine of von Meibom (274). The former thus answers it, and states his own view (II, 133): "It is here overlooked that the *pfand* is only a potential [*eventuelles*] equivalent for the debtor's performance, i. e. is given on the condition that payment do not ensue. But this assumes in itself the survival of the creditor's claim. . . . It does not alter the matter that he cannot bring an action for payment; the reason that he cannot is, not that he no longer has a claim, but that he has already in hand his potential means of satisfaction, and thus can of course no longer demand that which already he has provisionally received." Kohler (99, 100) takes the same view. The solution of this difference seems to be that each lays stress on a different stage of development. In the primitive notion of *wette*, there is no more of a surviving debt or obligation than there is to-day in our bet with stakes; but in the course of development the independent survival of the debt becomes more and more emphasized; and one of these stages of transition (and an early one) might undoubtedly be expressed in the language of Heusler, though the view of von Amira more accurately represents the primitive stage.

even in the late Middle Ages long after a fully developed system of debt had arisen; and even in the last century it was necessary in some of the codes in Germany to declare that the loss of the *res* did not deprive the creditor of his claim.¹

B. *a.* Along with the features of the development just described, there are also constantly mingled certain other phenomena that have to be carefully separated and accounted for. They are the product of the limited nature of the pledgee's property right in the *res* after default, and their transition stages are the result of his effort to make that right absolute. The key to their

¹ The primitive doctrine above explained (1*b*), that the creditor could not recover even though the *res* had accidentally perished, would probably never have been doubted by scholars as an historical fact if it had not been for the concurrent primitive doctrine that the pledgee was, as bailee, absolutely responsible even for accidental loss. These two doctrines were sometimes, in the legal records, merged into a rule of thumb which has been misinterpreted by some scholars. It can best be explained by taking the troublesome *Sachsenspiegel* passages. This first says (III, 5, § 4), that the pledgee-bailee is absolutely liable: "Svat man aver deme manne liet [lets] oder sat [pledges], dat sal he [the bailee] unverderft wederbringen, oder gelden na sime werde." Then it makes an exception (§ 5) for animals pledged: "Stirft aver en perd oder ve, binnen sattunge, ane jenes scult [without the pledgee's fault], bewiset he dat und darn he dar sin recht to dun, he ne gilt es nicht." So much as to his liability as bailee to the pledgor offering to redeem. But suppose the pledgor does not redeem, and the pledgee claims the debt (which he would try to do if the *res* were lost); this the law next calls to mind: "He hevet aver verlorn sine gelt, dar it ime vorstunt." Thus, there is an alleviation made for him from his generic liability as bailee to a redeeming pledgor; but the forfeit idea — i. e. as regards his claim against the pledgor — is strictly maintained. The oath of innocence which he takes has to do only with his getting the benefit of the former, and does not affect the latter at all. In the later Magdeburg law the situation is thus described: "der schade ir beide schade sein"; i. e. the *res* is at the risk of the pledgor so far as he is a bailor, and is at the risk of the pledgee so far as he has taken it, in lieu of his claim as a pledge. The distinction in Sweden (*Amira*, I, 213) and elsewhere by which "both bear the loss" (i. e. the pledgor can hold the pledgee by an offer to redeem) if the *res* has been burned with the pledgee's own goods, though he must replace it if it is stolen, involves a modification of the pledgee's bailee-liability, and does not affect his loss of his claim against the pledgor, which it assumes as unquestioned.

It is thus useless to lay down simply the proposition (as certain earlier scholars did) that in pledges the "risk" primitively was, or was not, the pledgee's; only by taking the above distinction can the situation be accurately described. The two situations may arise separately; for it is only when the perished *res* was worth more than the debt that the pledgor will ever offer to redeem and thus raise the question of the pledgee's liability as bailee; while if the *res* was worth less, the pledgor will not try to redeem and the pledgee will try to make the pledgor pay, and will thus raise the single question of the nature of the pledge-transaction.

Stobbe (*Vertr.* 260) and Meibom (367) have fully explained, in substantial harmony, the correct significance of the passages; Heusler (II, 203) expresses the same conclusion briefly.

explanation is the part played by the *auflassung* (resignatio, abdicatio, "se exitum dicere") of the Germanic law. It is enough to call to mind that the Germanic notion of a complete transfer of a property-right involved three distinct elements,—the *sale* or *traditio*, the *gewere* or *investitura*, and the *verzicht*, *uplaten*, *werpitio*, *dewerpitio*, *auflassung*, *resignatio*. The first two dealt with the transfer of possession or control over the *res*, and were later symbolically merged in a transaction which was in effect single, and is sufficiently indicated by the one word *traditio*. The third, however, remained essentially separate; it signified the final and complete abandonment of all right or interest in the *res*. One would, for example, give *traditio* equally in a sale, a life-estate, a pledge; but in the first there would also be *auflassung*, in the last two there would not.¹ To the Anglo-American lawyer the idea presents no difficulty, for it is already familiar to him throughout the history of his own law; it is in essence and in historical continuity the *remittere* and *quietum clamare* of the 1200's and the "release" and "quitclaim" of later times.² The significance and historical importance of the idea can easily be understood by those who have read the articles of Professor Ames on Disseisin.³

Now, when the primitive Germanic pledgor defaulted, the pledgee was not hampered by any question of a duty to appraise or sell the *res* and hand back the surplus value; on the contrary, the *res*, so far as it was now his, came to him as a whole and undiminished. But the *res* was not his absolutely; that was his difficulty. It was not that he had a *duty* to sell; such a notion was then unthought of; it was that he had not the *right* to sell. He had only a defective title to give, and even if he disposed of that, the ultimate possessor might (in the case of personalty) hold the *res* successfully against the pledgor by the doctrine of *hand muss hand wahren*,⁴ and then the pledgor might come against the pledgee for wrongfully disposing of the goods. The fact that the pledgor was in default by not redeeming at the due time did not help the matter; the trouble was that a defect existed in the very property-right of the pledgee, i. e. he had never had an *auflassung* from the

¹ "*Auflassung*" was sometimes used by older German scholars in a sense inclusive of *traditio*. The true doctrines of Germanic law, in particular the significance of *auflassung*, are here assumed to be those established by Heusler in his "*Gewere*," and expounded in their latest form in his "*Institutionen*," II, §§ 92-94.

² Pollock and Maitland, *Hist. Eng. Law*, II, 90.

³ 3 HARVARD LAW REVIEW.

⁴ Heusler, II, 10, 212.

pledgor.¹ This defect prevents him from doing as he pleases with the *res*; usually, he pleases to sell; hence he must get a good right to sell.

Furthermore, the process of curing this defect of title after default must be distinguished from the process of reducing to a term the unlimited period for redemption which the pledgor had if no period had been expressed for redemption. The *wette* without any fixed period was (primitively at least) as common, if not commoner than the other,² and in such case the right of redemption might go on through generations.³ This, too, the tribe of pledgees were interested in changing. But notice that two steps would here be necessary: first, a period must be supplied for redeeming, and then the situation is as if there had been a limit originally; but, next, after a default at maturity of the period, the defect of title also remained, and this, too, had to be remedied, as in the general case above described.

a'. This being so, it is easy to see that the sale of the *res*, about which so much is said in the earlier sources, has nothing whatever in common with our modern compulsory sale. It is simply an incident, and the commonest, in the pledgee's efforts to cure the defect in his title by cutting off the pledgor's outstanding right and thus curing the lack of *auflassung*. Let us examine the unmistakable marks of this.

(1) He is always spoken of as asking for or receiving a "*libertatem vendendi*" or "*distrahendi*"; i. e., he *wants* to sell, and some obstacle to a sale has been removed.⁴

(2) In the stage reached by some of the laws, the permission to realize is confined to a re-pledge by the pledgee for the amount of his claim, and a sale by him is expressly disallowed.⁵ Another stage is represented by laws permitting the sale only where a re-

¹ Heusler, II, 141: "If any doubt could exist on this point, it would be removed by the fact that the documents in a *satzung* never speak of *resignare*; that the laws always place *setzen* and *auflassen* in antithesis, using the former for pledge-giving, the latter for ownership-transfers; that the land-registers were classed into *libri resignationum* and *libri impignorationum*; and that after a sale the regular entry is '*coram consulibus resignavit*,' which is wholly lacking for pledges."

² Neumann, 192.

³ Meibom, 380; Amira, II, § 22; hence the proverb, "*versatz verjähret nicht*."

⁴ "*Potest venundare de licentia*" is another phrase. See instances in Meibom, 331; Kohler, 7 ff.; Weisl, 25, 39, 63; Amira, I, 213.

⁵ E. g.: "[When the pledgee wants to realize on default,] *daz* [the *res*] *sol er dem andern ansagen* [notify], und wann der *daz* nit zu lösen hat, so soll er *daz* nit höher versetzen als um sein schult, *aber verkaufen soll ers nit*" (Kohler, 11).

pledge is not practicable.¹ Still others give an option either to re-pledge or to sell.²

(3) The proceeding which he took was the generic one for cutting off outstanding claims. The pledgee or other person applies to the judge to summon all who may have any claim to the *res* to come and make it known; then the judge appoints a period for this, and at its end, by the expedient of *mittere in bannum*, declares the petitioner's title absolute.³ The notice in this case was: "This pledge is to belong to this man, according to his right; if there be any one who would redeem it, let him take care to redeem it, as his right is"; and the judgment was, that "he take the pledge to his own use, and be from the other quit and free"; and the phrase for it was "eigenen," i. e. it was made his own.⁴ In the case of personal property, where the periods of *aufbietung* were short, — three weeks, for instance, in some customs, — and where the pledgee was usually in later times a professional money-lender, the process reduced itself in effect to a sale after notice, and the statement of the custom would briefly be that the pledgee was per-

¹ E. g.: "Wel her [pledgor] is denne nicht loszen, so vorsezte her [pledgee] is vor singelt, ob her mac; *kan her is nicht vorseze*, so mag her is vorkouffe" (Kohler, 6).

² Kohler, 7, 14. The reason for the pledgee's readiness to re-pledge seems to have been, as Kohler suggests (19), that as the risk of loss (both as bailee and as creditor) was upon him, he would naturally be anxious to get rid of the risk in any way.

³ Heusler (II, 85) describes the process; examples of terms of delay, etc., are given in Kohler, 10 ff. This *ufbieten*, *aufbietung*, or offering to the debtor for redemption, is not to be confused with the same process when made to cut off the claims of the heirs (or other persons having the *retraktrecht*, *retrait lignager*, or right of preferment in buying). In the periods and places where this survived, the cutting-off process might also have to be employed as against such persons; yet by some customs the debtor was bound to have offered the *res* in pledge first of all to those persons, and thus there was no need for cutting off the right which they had previously renounced. The different varieties of situations are illustrated in Amira, I, 221; Kohler, 116; Weisl, 42.

⁴ That it was this generic process to which the pledgee resorted is clear: Meibom, 335; Heusler, II, 138; Stobbe, Priv. 270, 623, 627; Amira, I, 213. Its nature is well brought out in the case of the indefinite-period pledge; for here the pledgee had to have two periods fixed. By one he merely got a time fixed for redemption, i. e. made it possible for a default to occur; by the other he cured his defective title after default made; thus, from the Prague Stadtrecht: "Si judaeus receperit a christiano pingnus, et per spacium *unius anni* tenuerit, si pingnoris valor mutuampecuniam non exceserit, judaeus pingnus judici suo demonstrabit ut postea habet libertatem vendendi; si quod pingnus apud judaeum *diem et annum* [i. e. additionally] remanserit, nulli postea desuper respondebit" (Meibom, 333); "[The pledgee] so sol iz zu pfande haben jar und tag, [then a triple summons and offer, then] is der richter vor etlichen scheppfen disem [pledgee] ledicleychen antwurten [pronounce free], das er is vorsetzen und vorkauffen muge und seines geldes doran bekommen" (Kohler, 8). For Scandinavia, see Amira, I, 203.

mitted to sell after notice. But this was merely the superficial feature; the process was in essence a making the title absolute, and the sale was simply the use which would generally be made of the *res* when the title became absolute.

(4) That the cut-off proceedings had in essence nothing to do with sale, and in particular that the sale had nothing to do with any duty to restore the surplus to the pledgor (our modern idea, which is apt to be associated with this older process), is further clearly seen from the facts that (a) the pledgee was allowed to employ the cut-off process, and to get permission to sell or to keep, long before he was compelled to restore the surplus,¹ and (b), conversely, the duty of restoring the surplus, when that stage is reached, is found even where the pledgee keeps the *res*, and quite independent of sale by him.²

a". This proceeding, then, by means of *aufbietung* and *mittere in bannum*, supplied the defect of title which arose from the lack of the *auflassung*, *resignatio*, or "release" element. But why could not this be supplied by the pledgor himself? It could be. It might be done by actual *auflassung* or *resignatio* after default;³ but this was rare, of course, being dependent on the pledgor's good will. Instead of this the customary method came to be the embodiment of an *auflassung* clause in the original document, —

¹ E. g. in Lübeck, as late as 1325, he might sell without accounting for the surplus: Meibom, 332; see also Amira, I, 203. A custom of Noyon, in 1181, shows clearly the process: "Siquis terram vel domum in vadimonio posuerit, vel aliquid aliud, et determinato tempore non reddiderit [paid], ille qui vadimonium habet, si voluerit illud assignare sibi et ad se trahere, iudices et scabinos illuc adducat, et si post infra quindecim dies redemptum non fuerit, perpetuo sibi jure possident" (Kohler, 138).

² E. g. in Freiberg, it was provided by law "doch das dieses pfand geschätzt sey durch das gerichte, und die besserung an dem das guth gewest [i. e. pledgor] geweisert werde" (Meibom, 338). So for an express clause in a document of 1077 in Salerno: "Et si ipsi tari [golden money] minime nobis [pledgee] rettere potuerit de propria sua causa, et illud nobis dandum venerit, atjungamus [hand over] ei pretium a super [over and above] ipsi tari, sicut ipsa rebus abpretiata fuerit per doctos omnes et deum timentes, et firma nobis carta emtionis secundum legem facta et cum pena obligata" (Kohler, 88); on default the pledgee is to restore the surplus "quanto tres justi hominis existimaverit," and the pledgor is to execute a deed of sale (Id. 86). See also Amira, I, 205. In many laws the pledgee is expressly said to have his choice between keeping the *res* and selling it: Weisl, 69; Stobbe, Priv. 623. 627; Amira, I, 205; II, § 22.

³ Heusler gives an example (II, 139): "Predium meum abbati pro C marcis exposui et statuto die cum memorata pecunia solvere proposui; cum vero prefixus dies advenisset et abbas argentum mihi dudum datum requisisset, minime illud recompensare valens, predium abbati in perpetuam possessionis institutam obtuli."

this being done at a time when the debtor would be more ready to concede any terms demanded. Until the use of the *carta*, or written conveyance, became customary, and the process of transfer at a distance from the premises and by *carta* alone became frequent, this embodiment of the *auflassung* in the deed of pledge would not be so natural; but towards the end of the Middle Ages it would be the most natural method (except for personal property, in which transfer by document would of course be unusual, and, originally, impossible¹); and hence, while the judicial cut-off proceedings always remained the usual resort of the pledgee of personal property, the pledgee of real property, by the above period, more frequently attained his purpose by a *resignatio* clause in his pledge document.²

a'''. Abuse of the *resignatio*-clause. So far all was well; the thought of the community was that the pledgee should have his cut-off, and he was allowed to get it either by the judicial proceeding or by the deed clause. If the primitive rule as to non-restora-

¹ Heusler, II, 201.

² The forms are innumerable: "[On default, the pledgee] in posterum tria jugera titulo emtionis pleno jure proprietario, cum pleno rerum domino, quod exnunc sicut extunc in eum transferimus, libere possidebit" (Heusler, II, 140); "Si intra hinc et festum . . . non exsolvimus, . . . ipse dominus [pledgee] dicta pignora pro se retinendi, ea obligandi, et vendendi, plenam facultatem habebit" (Meibom, 333); "[the pledgee] poterit vendere absque ulla prosecutione coram judicio facienda [i. e. without cut-off proceedings]" (Id. 335); A has pledged for seven years; if he can, he may redeem them; if he cannot then pay back the money, the land "pertinebit in perpetuum" to B (Wodon, 162); "Wadiavit . . . salinam . . . usque ad 21 annum; [if unpaid] . . . maneat in monachia sempiterna" (Id. 164); "si infra ipsi jamdicti decem annis completis nos vobis non potuerimus rettere ipsi jamdicti solidi, . . . vos abeatia integra eadem rebus [described] . . . , ad vestram proprietatem abendum et possidendum et faciendum exinde omnia quod vobis placuerit" (Kohler, 87); "[if default occurs,] permaneat ipsam terram supradictam ad R. [pledgee] et cui voluerit post se, in alode et comparato" (Id. 90); "si tunc redempte non fuissent, permansissent usque ad finem mundi" (Id. 91). Just as the judicial permission allowed a re-pledge, as preferable to or optional with a sale (see *supra*), so the pledgor's permission in the document might do the same: "Daruber gib ich in daz urlaub, ob in sein not geschicht, daz si di vorgenanten heof mit meinem guten willen, swo ich sei sezzen, wenn si mugen oder wellen" (Kohler, 16); and the permission might also cover a sale, instead of a self-appropriation (Kohler, 16, 17). — The difference between the ordinary pledge-clause fixing the time of redemption and the clause of *resignatio* renouncing all right in advance and giving absolute title contingent on default is clearly to be seen in these two examples; the first, fixing a pledge period: "per nos tenendam et habendam tam diu donec . . . pro predicta summa . . . redimatur" (Meibom, 279; see also Heusler, II, 138; Kohler, 287, 292, 307); the next, renouncing in advance all interest: "si nos in solucione negligentes extiterimus, . . . antedictum mansum et curia transibunt in possessionem et dominium sine contradictione qualibet, suis usibus perpetuo servitura" (Meibom, 261).

tion of surplus had continued, and, even then, if the judicial process had remained the sole or usual cut-off method, no new problem would have arisen. But the old rule had been left behind, and the pledgee was by this time bound to restore on default the surplus value to the debtor (whether he kept or sold the *res*). So long as he resorted to the judge for achieving his cut-off, the duty of restoration was managed easily enough; the judge declared the title of the pledgee absolute, either for keeping or for selling, on the terms, in the former case, that the *res* was appraised and the excess value paid to the debtor, and, in the latter case, that the surplus money received was so paid over. But when the cut-off came to be attainable (for landed property) by a *resignatio*-clause in advance, the pledgees soon found that this was an excellent method of evading the new rule about surplus restoration; for the *res* on default became the absolute property of the pledgee without his going to court, and he could keep it all, which he could not do if he had had to apply to the court; hence the popularity of the clause. It will be seen that, in the examples cited in the preceding note, the clauses all provide that the *res* shall go *in toto* to the pledgee, without any provision for surplus restoration. Now until the old notion of forfeit or equivalency had been thoroughly cast aside, and until the rule about surplus restoration had become a solid and instinctive element in the legal thinking of the community (which in some places did not come till the 1400's), the community would not be prepared to protest against this ingenious evasion of the rule by the use of the *resignatio*-clause. But when that time did come, the evasion would have to be stopped. It was not that there was anything to be said against the *resignatio*-clause in itself, i. e. as a cut-off; for this very cut-off was that to which the courts themselves had been accustomed for several centuries to aid pledgees. It was the abuse of this particular cut-off process in evading the surplus-restoration, that made it vicious. Now the enabling circumstance for the pledgee was that he got absolute title by operation of the deed, without going into court; and thus the obvious thing, by way of remedy, was to oblige him to do just what he had been used voluntarily to do under the old *mittere in bannum* proceeding, viz. come into court to get a complete title; for then the court itself could see that he accounted for the surplus. Thus the difference between his coming into court in the 900's and his coming into court in the 1500's was radical; then, he came *voluntarily* to get justice and have a defect of title cured;

now, after he had found out another way of curing that defect, and was using it to abuse a principle of justice that had grown up in the meantime, he came into court *compulsorily* to be made to do justice; the two situations being wholly distinct.¹

This, then, is the stage at which the pledge transaction emerges into what we call modern history. All through the 1500's the German customary laws were forbidding this evasion.² Already before this time the sea-laws of Wisby, with their advanced commercial ideas, had taken the same step.³ The same period finds the English courts occupied with the same undertaking. The imperial prohibition of the *lex commissoria* in Roman law, which has served as the theme of much fruitless discussion, is nothing more nor less than the same feature in the development of another legal system. The indigenous working out of the process in Germany was probably stopped by the reception of Roman law, which had long ago settled upon its solution of the problem.⁴ The details of its working out in England cannot be examined here.

For the form in which the problem was presented to modern law, then, we were indebted to two distinct principles, operating together to cause confusion and misinterpretation in the modern student's mind. First (A) the forfeit notion which had primitively prevailed, and had then given way to the notion of collateral security; and, next (B), the necessity of a *resignatio* or *auflassung*, which left a defect in the pledgee's title, and led him to strive to cure it, and revealed to him, in curing it, a way of evading the other principle; so that it became necessary for the law, in maintaining the former principle, to deal with that form of the latter through which the abuse was perpetrated. Only by keeping clear the history and separate workings of these two principles can we

¹ So that such a provision for sale or forfeiture as the following, which would fairly represent in its terms one of the earlier mediæval town laws, exists on modern statute books for wholly different reasons; Code Civil, art. 2078: "Le créancier ne peut, à défaut de paiement, disposer du gage; sauf à lui à faire ordonner en justice que ce gage lui demeurera en parément et jusqu'à due concurrence d'après une estimation faite par experts, ou qu'il sera vendu aux enchères."

² See examples in Stobbe, Priv. 270, 627.

³ Amira, I. 213.

⁴ The Roman law brought with it into Germany the prohibition of the *lex commissoria* or forfeiture-clause, and the prohibition still prevails, upon the theory that it enables the creditor unjustly "to obtain extraordinary profits" (Motive zum bürgerl. Gesetzb., 1888, III, 680, 820). As late as 1881 the courts were called upon to say that the Imperial law of 1867, abolishing the usury prohibition, did not abolish the *lex commissoria* prohibition (Vierhaus, Sammlung kleinerer privatr. Reichsgesetze, 303, n. 4).

understand the form which, by their collision, they gave to the transaction and the problem as it came before modern Germanic courts.

II. *The Pledge without Creditor's Possession.*

Neither etymology nor usage furnishes us in our language with terms exactly expressing the antithesis between the giving and the not giving of possession of the *res* to the pledgee; for the purposes of discussion, however, it is necessary to have a term that implies merely this antithesis; and accordingly the word "hypothec" will be here employed as indicating a pledge of which the custody is not given to the pledgee, but is retained by the pledgor.

The problem, of course, is to ascertain why that form of the transaction was in a given case chosen instead of the other, — to account for its existence as a distinct legal expedient. Not until we have learned this shall we be able to interpret and to harmonize its peculiarities, whatever they may be, and to understand its development. Now the dominant theory, particularly since Albrecht and von Meibom, has been, that in Germanic law the hypothec was a later ("neue Satzung") and an independent development; that when the primitive remedial expedient of self-redress (as a source of creditor's satisfaction) had developed into a system of regulated judicial execution for debt, the creditor found it natural to avoid the necessity of appealing to legal proceedings by securing beforehand from the debtor a consent to such a levy in case of default, the object of the transaction being the gaining of a right on his part to cause a sale of the property on default, and to take the proceeds sufficient to satisfy his debt. The theory of Brunner¹ and of Franken² (though only briefly explained) is slightly different, in that it posits a more direct historical connection between the process of judicial execution and the institution of hypothec; but the essential notion of the expedient in both theories is the same. The marked feature assigned to the hypothec (though they do not clearly bring out the antithesis between the "new" and the "old" *satzung*) is that it is a specific lien created by the debtor for the ultimate purpose of obtaining proceeds for the creditor by a sale (in Franken's phrase, "nach dem Verkauf zielend"). This notion

¹ 1880: *Rechtsg. der Röm. und Germ. Urkunde*, 194: "eine aus der *missio in bannum* hervorgegangene amstrectliche Verpfandungsform jüngeren Aufsprungs."

² 1879: *Französisches Pfandrecht*, 7: "Der Gerichtsban ist die Wurzel der Immobilien-Execution, und damit auch der neuern Satzung."

is natural enough to the Continental scholar; for in the law that he lives among he finds the *hypothek* (*hypothèque*) — the modern representative of the *neue satzung* — scarcely to be distinguished from our "lien," or sometimes even from a preferred claim in bankruptcy; the number of *privileges* and *hypothèques* given by law on the entire estate, and the frequent practical identity in legal effect between those and the consensual hypothec, tend to obliterate the distinction in thought; and the historical assimilation of the two would thus *a priori* commend itself there as plausible. But to the Anglo-American lawyer the learning about mortgages and the learning about liens and execution and preferred claims are distinctly separated in history and in thought; and he makes a natural association, wanting on the Continent, between mortgages with and mortgages without creditor's possession. This natural relation which is found in the legal thought of the modern community that peculiarly represents in its law the continuity of Germanic tradition will to us suggest *a priori* the plausibility of a wholly different view of the hypothec's history, which has been championed by Heusler and von Amira, — the view that it is historically of a piece with the generic *wed* (or *satzung*) already described; that it was simply a variety of that transaction, adapted to a special purpose; that it bore the features and followed in the main the development of the *wed*; and that it had no connection with the peculiar expedient of judicial execution until fairly modern times. This view we may now consider; first setting out the evidential marks of identity between the hypothec and the generic *wed* or *satzung* already explained; next, examining the *raison d'être* of the former; and then noticing its ultimate fate.

1. The hypothec, or "*neue satzung*," as identical in purpose and features with the generic *wed*, *satzung*, *ved*.

a. In the first place, the name is identical; this alone starts the probabilities in favor of an identity of institution.¹ They are en-

¹ *Satzen*, *versetzen* (verb idea), and *ved*, *wed*, *weddeschaft* (the *res* idea), were the generic terms for both: Meibom, 36; Stobbe, Priv. 273; Amira I, 193, 216; II, §§ 22, 23. *Unterpfand* (perhaps a translation of *subpignus*) and *subpignus* (the Roman term) came to designate the hypothec form: Meibom, 36, 263; Neumann, 197; Heusler, II, 148. (*Subpignus* in modern German writers is often used to mean a pledge upon a pledge, or *afterpfand*, i. e. by a pledgee himself; but it did not mean this either in Roman or in Germanic law: Sohm, Lehre der Subpignus, I). *Faustpfand*, *handhabendes pfand*, denoting the pledgee's possession of personalty, were later phrases based on the false etymology (*pignus*, fist) of the Roman *pignus*: Meibom, 37. *Vorkummern* or *bekummern* (our English "encumber") came to be, so far as anything was, the term for

hanced, moreover, when we find that the phrases in the other line of doctrines about private redress — pledge-taking, etc. — and about the later judicial execution are constantly contrasted with the terms indicating a voluntary pledge.¹

hypothec; and the terms *versetzen* and *vorkummern* are in later times often grouped as covering all kinds (see examples in Meibom, 429), much as *pignus vel hypotheca* were in Roman law, the former being the generic term, and the latter a species. *Kistenpfand* in some regions was used to denote the hypothec; “posuit domum suam pro cistoli pignare,” “sette sin hus to eyne kistenpande”: Meibom, 423; Amira, I, 216. *Fürpfand*, or contingent pfand, was another name used in Bavaria: Heusler, II, 148, Kohler, 234.

¹ The contrast of ideas appears in the two words *nam* and *set*, *nehmen* and *setzen* (“seize” and “hand over”): Meibom, 24; Amira, I, §§ 15–21. Other words in some places used instead of *nam* have the same idea: *badian* (force), *raf* (*raub*, seize): Brunner, II, § 110. This antithesis in the verb idea of the transactions lasts till modern times. The development of one is a part of the history of procedure; of the other, a part of the history of substantive law; and all the associations of the hypothec transaction are with the latter, not with the former.

But there is one confusing circumstance; *pfand*, *pant*, is used for both transactions; and this must be accounted for. Now the sources of the later law of execution were, roughly speaking, two (Heusler, II, § 117; Brunner, II, §§ 110–112; Amira, I, §§ 15–21, 28; II, §§ 11–16). (1) The creditor or injured person could primitively, in limited cases and following certain rules, go himself and carry off (*nam*) movable goods of the debtor sufficient to pay; they then became to him a forfeit-payment of the ordinary sort, i. e. they were at his risk till redeemed, and if not redeemed they were forfeited to him absolutely without regard to any surplus value; in Scandinavia the thing thus taken was designated (from the verb idea) as *nam*, while in Germanic tribes the thing taken was called usually *pant* (a word of uncertain origin, but probably having the same force). (2) Where the debtor's outlawry had occurred, the injured person might by a *strudes legitima* or “legal rape,” go and get satisfaction from the outlaw's confiscated personality; and, much later, the doctrine of *missio in bannum regis* obtained for him a similar satisfaction out of the confiscated realty, — the phrases being *missio in vorbannum*, *frombote*, *fromung*, and the like. Now these two processes worked towards each other, so that they came to share the common feature of securing satisfaction from any defaulting debtor subject to the control of the court. But the distinctive feature of the former process was still that the creditor got the *res* as a redeemable pledge only; while in the latter he got a true payment on execution. Hence the former process had bonds of relation with both the ordinary *wed* transaction and with the execution or *vorbannung* process; and for the one relation the *pant* word came to serve, while for the other the *nam* or *nehmen* idea was emphasized. Moreover, since what the creditor almost always got by *nam* was personality, personality pledges came naturally to be called *pant* generically, and the *wed* term was thus largely driven out of usage for personality (though *wadium* originally covered both personality and realty, and though the process itself — the *nam* — from which *pant* was borrowed, had a history independent of the *wed*); moreover, the original state of things is further shown by the fact that in Scandinavia *wed* was not thus driven out, though *pant* when borrowed from the German in later times covered, as in Germany, pledges both *nam* and *set*. Later still, *pfand* partly extends to realty also, — in such compound words as *kistenpfand*, *pfandschaft*. The case is much like that of our “pledge”; originally *pleige*, a personal surety, it practically drove out *gage* for personal property and restricted it (as “mortgage”) to realty; yet the old law

b. The pledge without creditor's possession is found quite as early as the other form;¹ which indicates that it cannot have made its first appearance through the development of the *missio in bannum*.

c. The documents indicate its nature to be simply that of a postponed or contingent *wed*.² This characteristic is the key to its origin, and will be explained later; it is enough here to note that the primitive transaction does not show signs of being complicated by the phrases of judicial process; it merely creates a present *wed* for the creditor, as payment against a loss which he *may* suffer, the debtor keeping possession until the issue is ascertained; and if it turns out that the pledgee does suffer the loss, he takes the *res* like any other *wed*.³

In some laws a transfer to take effect in future was not valid unless the transferee first had a present *gewere* vested in him for a year and a day; but just as actual transfer of *gewere* could here be avoided in such ordinary sales or gifts (i. e. with reservation of a

of personal suretyship is no more to be looked to as the source of our "pledge" doctrines than is the process of *nam* for the Germanic doctrines of *wed* and *pfand*. It should be added that as most hypothecs were of realty, and as *pfand* was chiefly applied to personalty, the hypothec is almost always (except in *kistenspand*) dealt with in mediæval Germanic law in the terms *wed*, *sats*, *satsung*; and thus there is ample evidence from etymology that the hypothec is quite distinct historically from the process of execution, independently of whether we are able or not to account for the use of *pfand*. Nevertheless, that use, though confusing, seems quite capable of explanation in the above manner.

¹ Stobbe, Priv. 272; Heusler, II, § 104; Amira, I. 216. Kohler, 24, gives a *capitula* as early as 866, dealing with it.

² A Scandinavian example (Amira, II, § 23): After selling a piece of land with warranty: "That this sale may be more firm and trustworthy, J. [the seller] has put us [the buyer] his farm of five acres, in M., in full liability, so that we are to take it if the above piece of land should be sued away from us." Germanic examples: After selling a mill and engaging to get the lord's consent to the sale: "quod si negligentia vel culpa prepediti non fecerimus, curias duas in M. ecclesiae loco molendini contulimus perpetuo possidenda" (Heusler, II, 145, also 152); after stating a debt: "Predictam autem villam tibi obligo et in pignore pono, ut si minime fecero te ad deliberandum ad suprascriptum terminum eo hordine et racione ut supra legitur, tunc tribuat tibi potestas *accedere et intromittere* sive ad proprium dominare *ipsa vestra pignora*, et tamquam legitimum documentum possidere, nullo vobis homine contradicente" (Kohler, 353); "Nos . . . *subpignoramus* curiam nostram . . . , et si in solutione . . . negligentes extitimus, . . . immediate, cum ipsis [creditors] placuerit, . . . *accipiant subpignora nostra*" (Meibom, 227, 261).

³ As Heusler expresses it (II, 145): "*Satsung* with a vesting of *gewere* in the creditor and *satsung* without transfer of *gewere* bear the same relation to each other as *traditiones a die praesente* and *traditiones post obitum*. Just as the latter are in nature and purport legally similar transactions, so the two types of *satsung* reveal themselves as one and the same."

life estate) by the transferor's paying a rent, nominal or substantial, in recognition of the transferee's *gewere*, so the same expedient was resorted to in hypothecs;¹ and so far as in later law the same end could be obtained in other cases by simply handing over a sealed deed drawn before a court officer, or by making an entry on the court records, it was also done for hypothecs.²

d. The unmistakable marks of the forfeit idea, which we have seen to belong to the ordinary *wed*, are found also in this form. In the first place, the *res*, if default occurs, in primitive times, pays the pledgee regardless of its deficiency of value, and the pledgor cannot be looked to for the deficit;³ while (as we saw above) the later law finds this departed from, and the debtor made liable for the deficit.⁴ In the next place, the *res* was forfeited, in the sense that the creditor took the whole, without any duty to return the surplus,⁵ — as in the ordinary *wed* or *satzung*; but here, too, the later law gets gradually away from this, and we find a valuation and return of the surplus.⁶ As before, in the ordinary *wed*, the

¹ Heusler, II, 147; the pledgee of a *res* intended as contingent payment for a breach of warranty is given "gewerschafft zu rechtem fürpfand," but until default he is merely to "ab dem fürpfand jährlich zu nutz und gewer rechter pfandschafft nemen ein hun."

² Heusler, II, 147; Bav. Landr.: "Wer dem andern pfant untwurt, und daz pfant dannoch in seiner gewalt beleibt, . . . da sol er im brief über geben mit sigel": Meibom, 49. Hence the custom of merely handing over title deeds to the pledgee as a form of hypothec: Heusler, II, 146; which lasted in Regensburg till 1813: Stobbe, Priv. 274; and is found in other countries as well. Moreover, so far as an ordinary transfer of land was required to involve a formal transaction before the assembly or court (Heusler, II, 100), just so far would this contingent pledge transfer require the same, and hence historically the origin in some regions of registration as necessary to the validity of hypothecs: Weisl, 42, 50; Stobbe, 287; so far as this persisted later and was extended, in the absence of a general transfer-registration, reasons of policy could have induced this special survival.

³ Stobbe, Priv. 276-278; Amira, I, 216; II, 23. Moreover, the same general but indescribable evidences of the equivalency-idea run through the documents, which give the reader a clear impression of the identity of the *wed* idea in both.

⁴ Stobbe, Ib.; Amira, Ib. (in the first passage, the Wisby law represents the more advanced or later stage).

⁵ Stobbe, Ib.; Amira, Ib.; Meibom, 435.

⁶ Stobbe, Meibom, Amira, *ubi supra*. A clause from a document in Meibom, 261, 262, shows how the *auflassung* or *commissoria* clause was used to dispense with the duty of restoration which the later law ordinarily placed on the pledgee; upon default, the pledgees "cum placuerit, immediate accipient subpignora nostra, facientes cum hiis omnibus, secundum formam proprietatis tituli, quitquit ipsis videbitur expedire"; again, "Si non redederemus . . . licentia aveatis tu aut tuos heredes supradicta terra avire et dominare in vestra potestate" (Kohler, 85). In Norway, the different stages appear very distinctly; the pledgee takes the whole *res* in forfeit, *unless* there is a special agreement that he is to take the equivalent of his claim only; in the next stage, he is

latter development — the pledgee's duty to restore the surplus — comes before the former, — the pledgor's liability for the deficit.¹ Parallel with this development of the forfeit-idea went also, of course, the development of the pledgee's efforts to cure the defect of his title, as already described for the ordinary *wed* with pledgee's possession; the pledgee on default was allowed to take proceedings to cut off the pledgor's right,² and he could also attain the same end by inserting in advance an *auflassung* or *resignatio* clause (*lex commissoria*);³ and this, too, the law afterwards struck at (as already explained) by compelling (not merely permitting) him to sell or re-pledge, in order that he should not by forfeiture of the *res* evade his duty of restoring the surplus value.⁴ The presence of these marked features of the forfeit-idea and its development seems to dispose conclusively of the "anweisung von executionsgegenständen" theory, — the theory that the original notion of the hypothec form was the securing of a lien on a *res* to be sold to get proceeds; as well as of the other theory, that originally by the *missio in bannum regis* the property was sold and the debt paid out of the proceeds.

e. The pledgee obtained a title to the *res*, good against third persons. This, if true, militates strongly against the theory that the

to take the exact equivalent of his claim, unless by special agreement he may take the whole. In Iceland an intermediate stage appears, in which he is to take double the amount of his claim, by measuring off for himself the land required, according to a valuation of the neighbors, — unless other creditors would suffer owing to the debtor's insolvency, in which case he takes only the exact equivalent; in the later law, he takes always the exact amount only.

¹ Stobbe, *Amira*, *ubi supra*. This is neatly to be seen in the laws mentioned by Stobbe; in some of them the stage of handing over the surplus is not yet reached; but in most of them a sale is to be made and the surplus handed over; within this latter group, however, are still some which do not require the pledgor to make up a deficit. So in *Amira's* records, the Wisby law, representing the later stages, requires the pledgee to restore the surplus, and the pledgor to make good any deficit; but an earlier text of the Hamburg law, on which the Wisby law was founded, does not contain a clause making the latter requirement.

² Stobbe, *Priv.* 276; the pledgee usually summoned the pledgor three times, and then the court gave him the ownership.

³ Some examples have already been given in the last note but one. It is worth noticing that a common form was one which (as we shall see) had formerly been used and much discussed in Roman law; the pledgor describes the transaction as a pledge, and declares that on default the *res* shall belong to the creditor as by sale, and gives the requisite *auflassung* in advance: "A *resignavit* R. hereditatem . . . pro 50 marcis . . . *tytulo pignoris*, usque ad instauc festum nativitatis Domini; si tunc argentum sibi non solverit, tunc dictam hereditatem *justo emtionis tytulo obtinebit*" (*Meibom*, 435; 1327 A. D.).

⁴ For Scandinavia, see *Amira*, I, 216.

debtor has merely promised the creditor a general right of levy and sale on default which he would otherwise either not have at all or have only by legal proceedings. This, if true, is more in harmony with the notion that the specific *res* is now the creditor's, subject to the contingency of default. That the pledgee did obtain a right good against third persons (e. g. to whom the pledgor might wrongfully transfer the *res* in the interim) seems clear, though it has been much disputed.¹ Moreover, a hypothec

¹ Heusler, II, 149; Amira, I, 216; II, § 23 (Iceland), 27 (Norway); Meibom, 428; Kohler, 22; Schulte, 500. Commonly this was specifically provided for by a clause; thus, for a ship: "Posuit navem suam pro 26 marcis, ita quod nec ipsam vendere poterit nec exponere [second pledge], nisi prius dicti denarii sunt per soluti" (Meibom, 412); so in the Codex Cavensis: "Non habemus potestatem per nulli modi nec bindere nec donare neque per nulla rationem ubique ipso dare" (Kohler, 23, 85). It has been suggested by Stobbe (Priv. 275) that this clause was intended to remove a doubt as to the existence of a property-right in the pledgee, and thus protect his interest; but this seems unsound, not only because the laws show explicit recognition of the right (see *infra*), but because (as Heusler points out, II, 149) this would not be an effective way of removing the doubt. Heusler's reason, however, (that the pledgor, having the *gewere*, could effectively employ it improperly were it not for this clause), does not seem more satisfactory; a better reason seems to be the simple one that, since the pledgor could effectively transfer the *gewere*, and since the pledgee (having agreed to treat the *res* as the equivalent of his claim on default) would ordinarily have no further claim for payment against the pledgor, and hence no redress at all in case of alienation followed by the buyer's year-and-day *gewere*, he naturally tried to protect himself by a special agreement from the pledgor not to transfer it; which would thus give the pledgee a claim for indemnity against the pledgor if he did. The pledgor's alienation was also often expressly prohibited by law (a law of 1658, quoted Kohler, 23: "Es soll niemand güthere verkaufen noch verwenden die der stadt oder jemand anders zum pfande stehen, er thäte es dann mit des raths erläubnuss oder mit willen sein bürgen und desjenigen den si unterpfändlich haften, bey der busse eines neuen schockes"); the purpose being here, not to save the pledgee from losing (for he would not), but to save purchasers from being defrauded; so also in Sweden (Amira, II, § 23).

That the law, quite apart from contract clauses, recognized the pledgee's right as pledgee to pursue the property though alienated is seen by the numerous provisions declaring that this pledgee's right should last no longer than a year and a day; this was because the purchaser's *gewere* after that time would protect him, — as indeed it would against any ordinary claimant (Heusler, II, 103, 149), whence the entirely normal nature of the creditor-pledgee's property appears still further; thus: "Verkauft eyn man synen huf, und vorreycht [transfers] den vor gerichte, den hof mogen des mannes schuldigere [creditors] nicht bekummern [obtain by hypothec], is sen sy [unless] dass der man, ee her den hof vorreychte, gelobit [promised] hette vor gerichte dy schult zu bezulen und hette sich verpflichtet und gelobit by syme sygen [seal]; wo daz geschege, so mochten die schuldigere den hof wol bekummern, und die ufreychunge [transfer] by [within] jare und by tage widersprechin" (Weisl, 49); "Si quis rem suam obligaverit [hypothec] cuicunque, et denuo illam alteri vendiderit, et emptor ipsam, ante faciem ejus cui obligata fuerit, anno uno expleto possederit, valeat movere; quoniam neglecterit ejus rite deputabitur, quod emptorem infra tot spatium exinde

of personalty was also allowable;¹ though perhaps not until a late period.²

f. The debtor who gave a hypothec could not, by primitive law during its life give another one to a third person.³ This is a notable feature of other systems of law, and it seems to be explainable on only one theory, viz. that since the *res* has been dedicated specifically as contingent payment for a possible default, and since (as we have just seen) the creditor-pledgee obtains a title to it pursuable in the hands of a third person, and since on default the pledgee will obtain the whole *res* as the equivalent of his claim, *regardless of any surplus value* that may exist, it is impossible to conceive of any other creditor as having a concurrent interest in that *res*. In short, this well-proven rule is not only consistent with, but is the inevitable consequence of the fundamental forfeit-idea in the *wed* or *satzung*.

2. The hypothec, then, being originally in legal nature nothing but a form of *wed* or *satzung* in which the pledgee was not given possession, what were the circumstances to which this form of *satzung* would be appropriate? Why and when would this form be used instead of the other? The answer has already been pointed out, viz., wherever the existence of a claim is not yet certain, i. e. a default is only contingent. The chief cases of this sort, as enumerated by Heusler (147) are: (1) Warranty of title in a sale of land; (2) Rent from a lessee or other rent-grantor;

appellare contempsit" (Kohler, 24); "Si quis cautionem fecit et non ei obligaverit . . . [not specifically, but merely hypothecating his whole estate, then if one *res* is sold to a third person,] habeat ipse qui eas emit; nam si obligatae fuerint nominativae [specifically], non eas possit vindere, dum ipsam cautionem non sanaverit [paid]"; then the commentary to this edict warningly adds: "ita obliget, 'ut eas [*res*], donec redimantur, alienare non possit, creditori proprias factas, si statuto tempore redemptae non fuerint,'" (Val de Lièvre, 206,) i. e. the *res* must be expressly declared to be the creditor's ("proprias") in case of a general hypothec.

¹ Meibom, 411, 415; Neumann, 197. But it was not known in Sweden: Amira, I, 216.

² Heusler, II, 201.

³ Meibom, 429; Stobbe, Priv. 274, 283; Amira, II, § 23 (in Iceland the pledgee might take possession immediately upon the pledgor's transferring to the third person); Kohler, 23. A later but transitional stage is seen in the rule that a second could be given only for the surplus-amount over the first; but as soon as the forfeit-idea disappears, and the pure notion of collateral security becomes established, it is perceived that any number of creditors are welcome to take their chances with the *res*, even though their united claims exceed its value; and so we find (Stobbe, 283) the codifications of the 1500's providing expressly that additional hypothecs are allowable.

(3) Liability of a debtor to a surety for possible default; (4) Liability of a guardian on account of an infant's revocation of a sale at majority, of a husband for a wife's claim of dower in property sold, and the like. In such cases, as Heusler remarks, "it would be unreasonable to make a *satzung* which would transfer the enjoyment of the property immediately to the creditor, for that would be wholly unnecessary and quite beyond what the creditor could have any pretext for demanding." The *res* was to be the *wed*, if there should be a default; but as there might not be any default, it was enough assurance for him to have the *res* legally dedicated in advance to cover that default, while remaining in the meantime in the obligor's hands. This explanation is not only *a priori* wholly natural and harmonious with the forfeit idea; but it is corroborated by the circumstance that the hypothec-documents of the Middle Ages are commonly given for just such contingent liabilities,¹ and those that are not may be explained as belonging to a later stage. A further consistency and probability appears in the fact that, in this law² as in others, the first hypothecs which the law establishes independently of agreement seem to be that of the landlord for rent and that of the wife for the return of the *dos*, i. e. purely contingent defaults; and it seems entirely probable that these first came into this recognition by having been universally provided for by agreement, and finally received as settled custom.³

¹ Thévenin, Textes relatifs aux institutions privées, I, no. 22 (for a guaranty of rent); Amira, I, 639 (relatives of S., who injured a monastery, agree to give their land to the monks *in perpetuo*, "if the said S. does them harm again"); II, § 27 (by a husband giving the wife a hypothec on the husband's other land as security for the *dos*, which was returnable on divorce or death; by a guardian for dealings with the ward's property; by a debtor to a surety on a debt; but chiefly by a grantor to the grantee as security against a failure of title or a defect of area).

² Amira, II, § 28.

³ Another piece of evidence of minor consequence (but worth while noticing because it reappears in Roman law) is this. The debtor could keep possession (since that was what was desired) of the *res* by giving the ordinary *wed* with livery to the pledgee, and then receiving it back on lease (Neumann, 197; Amira, II, 246). Now for ordinary claims, already due, this would have been amply sufficient; the creditor took the *res* in payment, and reaped a profit by letting the pledgor cultivate as tenant, just as he might have done to a third person. With this expedient as a possible one, there would have been no motive for resorting to the hypothec form as above described; i. e. if mere possession by the debtor was the object, based on convenience or on the creditor's confidence in the debtor, or on some other motive than the one above stated, why was not the livery-pledge with lease back to the pledgor the simple and sufficient method? This method clearly was understood, and yet it was not commonly resorted to. The theory of contingent default is the only one that explains the presence side by side of these two modes of debtor's possession-pledge; for clearly

3. What became of the hypothec in Germanic law? Here we come into the complicated learning about rents. The difference in principle and in history between an interest-bearing debt for which a *res* in the debtor's possession is security, and a periodical payment to be obtained from the proceeds of a given *res*, has been the theme of many competing theories. The problem is a much more difficult one in French than in Germanic law, for the canonical prohibition of interest developed in the former region many varieties of rents formed for the express purpose of lending money on interest. The exact process, however, by which the ordinary specific hypothec of the Middle Ages developed into its modern varieties does not have a necessary bearing on its origin as a species of *wed*. It is enough to note here that both Newmann and Heusler agree on a theory which is entirely consistent with the originally contingent purpose and specific limitation of the hypothec.¹ When the charging of a rent upon one's land became, for economic reasons (Heusler, I, 335), a popular practice,—in Germany, say in the 1200's—the expedient which the farmer-landlords (as above described) commonly resorted to, the hypothec, became soon equally popular; the rent from one piece was secured by another piece of land, contingently on default in the rent; and soon the rent-grantor merely gave a general hypothec on all his property (“*liegenden und fahrenden*,” “*in dorf und in hus, in feld und in stadt*”); still later, the rent issues out of all his property, without discrimination between the parts primarily and subsidiarily liable; and finally turns into a mere personal liability of the rent-grantor with a *res-incumbrance* indistinguishable from an ordinary general hypothec. Thus comes about an ultimate generic type of collateral security with all the complexity of its modern varieties.

[*To be continued.*]

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the livery with re-lease was *not* suited to the case of contingent liability (as giving the creditor what he had yet no claim to), while the hypothec form as above described (the postponed *satzung*) was suited to just the case of a contingent liability.

¹ Heusler, II, § 105; Neumann, 213, 243.

THE JUDICIAL CHARACTERISTICS OF THE LATE LORD BOWEN.

WHEN Lord Bowen died, in 1894, at the comparatively early age of fifty-nine, he had just attained one of the highest official honors of his profession. At the higher and more discriminating bar of professional opinion he had, however, for more than a decade enjoyed an assured pre-eminence. The tribute of Lord Esher, the Master of the Rolls, gives some idea of Lord Bowen's professional standing: —

“I cannot have any doubt that Lord Bowen was one of the most distinguished judges who have sat in the courts of England in my time. His knowledge of the whole law of England was so perfect and so accurate, and the whole law was so much at his command, that I have no doubt that he had studied every head and particular of English law not merely when a particular case involving the proposition came before him, . . . but he had studied the law minutely and earnestly before ever he was called upon to pronounce an opinion upon it. His knowledge of the law was vast; his power of expressing what the law was you have all experienced often. . . . His mind was so beautifully fine and subtle that he delivered perfectly expressed essays upon the law which will be handed down for use by future generations of lawyers.”

This high contemporary reputation was attained, too, in the face of some marked limitations. At the common law bar his style and manner were too academic to bring great success as an advocate; and during his brief experience as a *nisi prius* judge he soared too habitually above the heads of the jury to attain the best results from that often obtuse instrument of justice. It was in the Court of Appeal that he found at last his true sphere. Although he came to this tribunal a sufferer from an internal disease which caused him to be frequently absent, during his eleven years' service as Lord Justice of Appeal he delivered a series of judgments which for legal learning and literary grace are unsurpassed in the reports of English law. His subtle intellect, his cultured taste, his unique knowledge of legal history and mastery of the historical method as applied to the evolution of law, and his singular felicity in expounding legal principles, were the rare qualities

which, in spite of marked limitations, gave him the pre-eminent position which he unquestionably attained.

In comparison with the greatest of his contemporaries who were his peers in intellectual power, I should say that he shared with Westbury, Cairns, and Selborne a precision of thought and logical faculty which rendered his mind capable at once of entertaining the broadest views and the most subtle distinctions; but he lacked their versatility. He was the equal of Blackburn and Jessel in legal learning, without the pedantry of the one or the dogmatism of the other. In affinity and contrast Earl Cairns probably furnishes the best comparison. Among the great names just mentioned Cairns and Bowen had no equal in that cultured imagination which is essential to the exercise of the highest art. Earl Cairns has never had an equal, in my opinion, in that intuitive insight into legal principles which make his opinions sound like "an embodiment of the voice of the law stamping its seal upon what is obviously reasonable and just." His judgments were not so much ratiocinations as illuminations. In his mere statements the most complex legal problem passed out of his hands in so simple and clear a light that our wonder is why there should have been any difficulty. Cairns was a genius; Bowen was a scholar. The latter shows us the processes by which he arrives at his conclusions; we may observe the penetration and precision of a severely logical mind, expressed in language clear as crystal, and as luminous as it is subtle. Finally, in spite of physical sufferings to which all but Cairns were strangers, Lord Bowen shared with all these great jurists the habit of patient industry and close application without which intuitions are deceitful and gifts of exposition vain.

Lord Bowen had the very qualities which are most needed in these days of systematic reporting. His work will repay attentive study simply as a demonstration that depth of legal learning and literary grace of style and method are not incompatible. Certainly any distinctive style besides a slovenly one is least common among learned lawyers, and is as rare as it is refreshing in the reports. A conception of intellectual reserve, sense of proportion, and wholesome mental habits of discrimination seem to be quite unknown. Interminable opinions on questions of fact, elaborate restatement of settled principles, and the needless and mechanical citation of all the cases to be found on a given point, — these are the evils at the root of the present deluge of reports. If

one sixth of Lord Bacon's plan to simplify the law — "cases reported with too great prolixity to have their tautologies and impertinences cut off" — were carried into effect, it would make short work of the bulk of contemporary reports.

When we turn, now, to the records and remains by which posterity must judge Lord Bowen, their meagreness is disappointing. It fell to Lord Bowen's lot to be sacrificed for many years to the minotaur of professional practice under conditions which broke his health and frittered away his powers in such ephemeral work as unmasking the claimant for the Tichborne estate. He came, therefore, into the most congenial sphere which fate had ordained for him, a victim to physical sufferings which caused him to be frequently absent from the Court of Appeal. I doubt whether he heard more than five hundred cases during his eleven years' service. Even in these cases it is possible to convey only an imperfect idea of his service, for much of it was impersonal. In accordance with the custom of the Court of Appeal, the Master of the Rolls, who is the presiding judge, or, in his absence, the senior Lord Justice, delivers the opinion of the court. The other Lords Justices in most cases content themselves, if they agree, with simple affirmance, or at most a short supplementary opinion. In probably one half of the cases in which Lord Bowen sat, therefore, he added nothing beyond his simple assent; for during his whole tenure Esher was the spokesman in common law appeals, and Lord Justice Lindley in chancery appeals. Until 1890 he was also junior to Lord Justice Cotton. It appears to be the exception rather than the rule in the Court of Appeal to reserve judgment; but occasionally, when this is done, one of the Justices prepares and delivers, after our method, a written opinion for the court. Many of Lord Bowen's most brilliant opinions were given under such circumstances. During his whole service, however, he delivered the judgment of the court in this way only about twenty times. Furthermore, many of the cases in which he briefly adds his own views are cases where the judgment of the lower court is reversed, on which occasions, in accordance with a polite custom of which Lord Bowen was scrupulously observant, all the judges express their views to a greater or less extent. So that there are no more than one hundred and fifty cases in the reports in which Lord Bowen formulates an independent and comprehensive expression of his own views.

The most obvious characteristic of Lord Bowen's opinions is the

purity, ease, and accuracy of their style. Along with the legal acquirements which he shared with many of his contemporaries, he had what is rare in such minds, a sense of literary form, — “an instinctive preference for the right way of saying a thing, and the literary conscientiousness which impelled him to seek for the best expression of his thoughts.” One of his colleagues in the Court of Appeal said of him in this connection: —

“I doubt whether those who listened to or read his brilliant judgments would have the least notion how much thought and persistent effort he had given to them; and the extreme rapidity of his intellectual operations made this all the more remarkable to those who by daily intercourse saw the very pulse of the machine.”

In distinction of style his only equal among contemporary writers on legal subjects was Sir Henry Sumner Maine. He had no rival on the bench.

The best single illustration of his style in its perfection is his opinion in the “convent case” of *Allcard v. Skinner*,¹ where the question involved was, to use his own language, “What is the principle, and what is the limitation of the principle, as to voluntary gifts where there is no fraud on the part of the defendant, but where there is an all-powerful religious influence, which disturbs the independent judgment of one of the parties, and subordinates for all worldly purposes the will of that person to the will of the other?”

Characteristic specimens of his colloquial style may be found in *Borthwick v. Evening Post*,² *Magnus v. Queensland National Bank*,³ and *Hutton v. West Cork Ry. Co.*⁴

Turning to the more formal characteristics of his method, we find the same perfection of execution and fine sense of proportion. One may find in his works many aphorisms and lucid definitions which go directly to the heart of an issue and crystallize a principle in a single phrase. Such, for instance, is his remark in a case of deceit that “the state of a man’s mind is as much a fact as the state of his digestion,”⁵ or his statement that the knowledge of danger on the part of a person is the “vanishing point” of the liability of the occupier of premises.⁶ But the power of expressing the most subtle shades of thought and language which made Lord

¹ 36 Ch. D. 189.

² 36 Ch. D. 463.

³ 37 Ch. D. 479.

⁴ 23 Ch. D. 654.

⁵ *Edgington v. Fitzmaurice*, 29 Ch. D. 459.

⁶ *Thomas v. Quartermaine*, 18 O. B. D. 694.

Chancellor Westbury, for instance, such a master of legal maxims, appears in Lord Bowen's work rather in the production of a total effect or artistic whole. He had great skill, however, in the use of graphic, often humorous illustration. Witness his forcible illustration in the *Mogul Steamship Company* case,¹ of the expedient of merchants of sowing one year a crop of unfruitful prices in order by drawing competition away to reap a fuller harvest of profits in the future; and his query, in the same case, whether it would be an indictable conspiracy to drink up all the water from a common spring in time of drought. Among other noteworthy instances, see his illustration in *Hutton v. West Cork Ry. Co.*,² of sending down all the porters at a railway station to have tea in the country at the expense of the company; his success in laying the issue bare in *Thomas v. Quartermaine*,³ by his illustration of the builder employed to make repairs; his query in *Carlill v. Carbolic Smoke Ball Co.*,⁴ whether every one who sought to find a dog for a reward must sit down and write a note to the owner accepting the proposal; his illustration of being waylaid in Pall Mall, in *Magnus v. Queensland National Bank*; ⁵ and his reference to the Apostles' spoons in *Saunders v. Weil*.⁶

His general method of procedure in an exhaustive opinion was to state at the outset in a few words the point in issue, and the circumstances under which it arose; then to examine the principles involved; following with the citation of authorities, and, finally, the application of the whole in the decision of the case at issue.⁷

The issue in *Mogul Steamship Co. v. McGregor*⁸ is stated thus:—

"We are presented in this case with an apparent conflict or antimony between two rights that are equally guarded by the law,—the right of the plaintiffs to be protected in the legitimate exercise of their trade, and the right of the defendants to carry on their business as seems best to them, provided they commit no wrong to others. The plaintiffs complain that the defendants have crossed the line which the common law permits; and inasmuch as, for the purposes of the present case, we are to assume some possible damage to the plaintiffs, the real question to be

¹ 23 Q. B. D. 598.

² 18 Q. B. D. 694.

³ 37 Ch. D. 479.

⁴ 23 Ch. D. 654.

⁵ [1893] 1 Q. B. 265.

⁶ [1893] 1 Q. B. 474.

⁷ *Maxim Nordenfelt Gun & Ammunition Co. v. Nordenfelt*, [1893] 1 Ch. 631; *Mogul Steamship Co. v. McGregor*, 23 Q. B. D. 611; *Svensden v. Wallace*, 13 Q. B. D. 69.

⁸ 23 Q. B. D. 611.

decided is whether, on such an assumption, the defendants in the conduct of their commercial affairs have done anything that is unjustifiable in law."

A good illustration of his method, down to the examination of authorities, may be found in *Johnstone v. Milling*:¹—

"The question which we have to decide arises with regard to the defendant's counterclaim. The claim made by the defendant is upon a covenant [in a lease to him], by which the plaintiff undertook, after the expiration of four years from the commencement of the term, to rebuild the premises upon notice from the defendant to do so. The defendant says that before the time had arrived for the performance by the plaintiff of this obligation he repudiated his liability on the contract, and so conferred an immediate right of action on the defendant. We have, therefore, to consider on what principles and under what circumstances it must be held that a promisee, who finds himself confronted with the declaration of intention by the promisor not to carry out the contract when the time for the performance arrives, may treat the contract as broken, and sue for breach thereof. It would seem, on principle, that the declaration of such intention is not in itself and unless acted on by the promisee a breach of contract; and that it only becomes a breach when it is converted by force of what follows into a wrongful renunciation of the contract. Its real operation appears to be to give the promisee the right of electing either to treat the declaration as *brutum fulmen*, and, holding fast to the contract, to wait till the time for its performance has arrived, or to act upon it, and treat it as a final assertion by the promisor that he is no longer bound by the contract and a wrongful renunciation of the contractual relation into which he has entered. But such declaration only becomes a wrongful act if the promisee elects to treat it as such. If he does so elect, it becomes a breach of contract and he can recover upon it as such. Upon looking to the reason of the thing, it seems obvious that in the latter case the rights of the parties under the contract must be regarded as culminating at the time of the wrongful renunciation of the contract, which must then be regarded as ceasing to exist except for the purpose of the promisee's maintaining his action upon it; it would be unjust and inconsistent with all fairness that the promisee should be entitled to bring his action as upon a wrongful renunciation of contract, and yet to treat the contract as still open and existing as regards the future. Such being the reason of the thing, the authorities seem to be all the same way."

And then he proceeds to examine the authorities and apply them in the decision of the case. It was his invariable method

¹ 16 Q. B. D. 472.

to eliminate with dexterity all superfluous and irrelevant circumstances, to break up complex questions into their simple components, and to narrow the controversy to an issue. Many illustrations might be given of his subtlety in clearing the ground by going straight to the pith of a case, and placing his premises beyond misconception by careful and accurate definition of terms in which there was any possibility of ambiguity.¹

After the precise issue was found he was also always careful not to go beyond it. A notable example of this is the case of *Davies v. Davies*,² where he declined to discuss the subject of restraint of trade because the matter was not directly in issue. A good example of his acuteness in summarizing the exact ground of his decision may be found in a subsequent case involving that issue:—

“The rule as to general restraint of trade ought not, in my judgment, to apply where a trader or manufacturer finds it necessary, for the advantageous transfer of the good will of a business in which he is so interested, and for the adequate protection of those who buy it, to covenant that he

¹ In the case of *Mogul Steamship Co. v. McGregor*, 23 Q. B. D. 611, involving the legality of a combination to control trade, he said:—

“We were invited by the plaintiffs’ counsel to accept the position from which their argument started,—that an action will lie if a man maliciously and wrongfully conducts himself so as to injure another in that other’s trade. Obscurity resides in the language used to state this proposition. The terms ‘maliciously’ and ‘wrongfully’ and ‘injure’ are words all of which have accurate meanings well known to the law, but which have also a popular and less precise signification, into which it is necessary to see that the arguments do not imperceptibly slide. An intent to ‘injure’ in strictness means more than an intent to harm. It connotes an intent to do wrongful harm; ‘maliciously,’ in like manner, means and implies an intention to do an act which is wrongful, to the detriment of another. The term ‘wrongful’ imports in its turn the infringement of some right. The ambiguous proposition to which we were invited by the plaintiffs’ counsel still, therefore, leaves unsolved the question of what, as between the plaintiffs and defendants, are the rights of trade. For the purpose of clearness I desire, as far as possible, to avoid terms in their popular use so slippery, and to translate them into less fallacious language wherever possible.”

See also his opinion delivered before the House of Lords in the great case of *Dalton v. Angus*, 6 App. Cas. 779. Other illustrations of his habit of accurate definition are his distinction between the defences of contributory negligence and a defence resting on the maxim *volenti non fit injuria*, *Thomas v. Quartermaine*, 18 Q. B. D. 691; his remarks on the use of the term “special damage,” *Ratcliffe v. Evans*, [1892] 2 Q. B. 524; on the confusion arising from treating cases of dismissal of servants by a master as instances of a rescission of the original contract, *Boston Deep Sea Co. v. Ansell*, 39 Ch. D. 365; on the distinction between an act and its consequences, *Harrison v. Muncaster*, [1891] 2 Q. B. 687; on the incorrect practise of speaking of the right to light as an ordinary easement, *Birmingham Banking Co. v. Ross*, 38 Ch. D. 312; on the vague use of the term “adoption,” *Falcke v. Scottish Insurance Co.*, 34 Ch. D. 249.

² 36 Ch. D. 359.

will retire altogether from the trade which is being disposed of, provided always that the covenant is one the tendency of which is not injurious to the public. This last element in the definition ought not, I think, to be overlooked, for I can conceive cases in which the absolute restraint might, as between the parties, be reasonable, but yet might tend directly to injure the public; and a rule founded on public policy does not admit of any exception that would really produce public mischief; such might be possibly the case if it was calculated to create a pernicious monopoly in articles for English use, — a point I desire to leave open, and one which, having regard to the growth of syndicates and trusts, may some day or other become extremely important.”¹

In facility and precision of statement of legal propositions leading up to or summarizing an argument, omitting no essential qualification, and expressing neither too little nor too much, Lord Bowen was a master. His clear and comprehensive statement, in *Thomas v. Quartermaine*,² of the duty of the occupier of premises, is an excellent illustration of this.³

More than a century ago, Burke observed that the practice of the law, though in his view “a science which does more to quicken and invigorate the understanding than all the other kinds of learning put together,” does not always, except in the highest order of intellects, “open and liberalize the mind” and is even apt to give a turn to “think the substance of business not to be much more important than the forms in which it is conducted.” Judged by this

¹ *Maxim Nordenfelt Gun & Ammunition Co. v. Nordenfelt*, [1893] 1 Ch. 631.

² 18 Q. B. D. 694.

³ In *Baroness Wenlock v. River Dee Co.*, 36 Ch. D. 684, Lord Bowen gave the best statement of general corporate powers to be found in the reports. In the course of a singularly lucid opinion, in *Abrath v. Northeastern Ry. Co.*, 11 Q. B. D. 455, he simplified the use of the term “burden of proof.” In *Low v. Bouviere*, [1891] 3 Ch. 105, he defined estoppel. In *Steinman v. Angier Line*, [1891] 1 Q. B. 621, he showed how the usual exceptions in a bill of lading “limit the liability, not the duty.” He summed up his view of the law applicable to contracts in restraint of trade in the following terms in *Maxim Nordenfelt Gun & Ammunition Co. v. Nordenfelt*, [1893] 1 Ch. 631: —

“The result seems to me to be as follows: General restraints, or, in other words, restraints wholly unlimited in area, are not, as a rule, permitted by the law, although the rule admits of exceptions. Partial restraints, or, in other words, restraints which involve only a limit of places at which, of persons with whom, or of modes in which, the trade is to be carried on, are valid when made for a good consideration, and where they do not extend further than is necessary for the reasonable protection of the covenantee. A limit in time does not, by itself, convert a general restraint into a partial one. ‘That which the law does not allow is not to be tolerated because it is to last for a short time only.’ In considering, however, the reasonableness of a partial restraint, the time for which it is to be imposed may be a material element to consider.”

supreme test of intellectual capacity, Lord Bowen has few superiors. Law, to him, was not a mere collection of rules. As he said in one case, "There is no magic at all in formalities."¹ He recognized, to use his own language, the duty of endeavoring to apply legal doctrines so as to meet "the broadening wants or requirements of a growing country, and the gradual illumination of the public conscience." When he cited authorities, it was only to support conclusions which he had already reached by the independent exercise of his judgment. He had no patience with the servile citation of cases to define general terms, which are necessarily relative, and which if finally defined would lose half their efficiency.² In dismissing summarily a needless action he said:—

"I regret that we have to add one more to the cloud of cases which are collected around this particular point. The law has been clear for fifty years, and all the cases that have been reported since that time are merely illustrations of the way in which the court applies the principle."³

No better example of the triumph of reason and justice over technicalities can be found in the reports than Lord Bowen's opinion in *Ratcliffe v. Evans*.⁴ In that case he extracts the spirit from the technical rule, and applies it with unerring precision, to the discomfiture of the counsel who raised it.

In speaking of applying in modern times the ancient rule as to contracts in restraint of trade, he said, in *Maxim Nordenfelt Gun & Ammunition Co. v. Nordenfelt*:⁵—

"A covenant in restraint, made by such a person as the defendant with a company he really assists in creating to take over his trade, differs widely from the covenant made in the days of Queen Elizabeth by the traders and merchants of the then English towns and country places. When we turn from the homely usages out of which the doctrine of *Mitchell v. Reynolds*, 1 P. Wms. 181, sprang, to the central trade of the few great undertakings which supply war material to the executives of the world, we appear to pass to a different atmosphere from that of *Mitchell v. Reynolds*. To apply to such transactions at the present time the rule that was invented centuries ago in order to discourage the oppression of English traders and to prevent monopolies in this country, seems to be the bringing into play of an old-fashioned instrument. In regard,

¹ *Miles v. New Zealand Co.*, 32 Ch. D. 289.

² *In re Young & Harston's Contract*, 31 Ch. D. 174; *Ex parte Griffith*, 23 Ch. D. 74.

³ *Green v. Humphrey*, 26 Ch. D. 479.

⁴ [1892] 2 Q. B. 529.

⁵ [1893] 1 Ch. 631.

indeed, of all industry, a great change has taken place in England. Railways and steamships, postal communication, telegraphs, and advertisements have centralized business and altered the entire aspect of local restraints on trade. The rules, however, still exist, and it is desirable that they should be understood to remain in force. A great care is evidently necessary not to force them upon transactions which, if the meaning of the rule is to be observed, ought really to be exceptions."¹

The boldness with which he applied established principles to a new subject matter may be shown by the case of *Dashwood v. Magniac*,² where the law applicable to grants of minerals, according to which, under certain circumstances, the consumption of part of the inheritance is held not to be waste, was applied to the periodical cutting of timber by a tenant for life of a freehold estate.³ It must not be supposed, however, that Lord Bowen failed in respect to general rules which have been found of value in the administration of the law. As he said in *Quartz Hill Gold Mining Co. v. Eyre*:⁴—

¹ See also *Jacobs v. Crédit Lyonnaise*, 12 Q. B. D. 589, and *Ratcliffe v. Evans*, [1892] 2 Q. B. 529.

² [1891] 3 Ch. 306.

³ He supports his conclusion in this case with great force:—

"The absence of authority in the early English law for the extension to timber plantations of the principle in question is, however, a matter on which the appellants are entitled to lay stress. But the Year Books and the older Abridgments are not likely to furnish illustrations in which legal principles are applied to a comparatively modern system of arboriculture. Mining and quarrying have come down to us from the remotest ages; but the culture and periodical cropping of trees such as that proved in the case before us, are the growth of a later period altogether. Occasion to invoke the principle for the benefit of grantees of 'timber estates' arises only in a time when woods are cultivated on the plan of annual croppings, and when to treat them otherwise would be to destroy the revenue of a property and to paralyze its management. . . . We have been told that to apply to timber the doctrine which has been adopted in the case of minerals will be to transfer it to a subject matter where no line can be drawn as marked and unmistakable as the line presented always by the open mine. But it is not a valid objection to a legal doctrine that it will not be always easy to know whether the doctrine is to be applied in a particular case. The law has to face such embarrassments. . . . The instance to which the legal principle is now for the first time adopted by this court may be new, but the principle is old and sound; and the English law is expansive, and will apply old principles, if need requires it, to new contingencies. Just as, in America, the law of watercourses and of waste has modified itself to suit the circumstances of enormous rivers and wide tracts of uncultivated forest, so the English law accommodates itself to new forms of labor and new necessities of culture; it favors the profitable holding of land. In a case like the present, good sense borrows accordingly, as it seems to me, the doctrine which has hitherto found its most remarkable illustration in the instance of the open mine, and applies it to the more novel case of a timber plantation which is cultivated for periodical croppings, and which forms a substantial item of yearly revenue to the owner of the property."

⁴ 11 Q. B. D. 688.

"Although every judge of the present day will be swift to do justice, and slow to allow himself as to matters of justice to be encumbered with either precedents or technicalities, still every wise judge who sits to administer justice must feel the greatest respect for the wisdom of the past."

He was ready on proper occasions to sacrifice his personal views. When he was unable to follow authorities which seemed to offer a speedy solution of the controversy, we find none of the coarse dogmatism which mars so much of Sir George Jessel's work. Without any obtrusion of his own personality, he gives his reasons for his action. Thus, in a case involving the construction of a will,¹ he said:—

"Although I do not disguise from myself that many judges . . . have used language to the effect that you must, before you can include under the name which the law usually appropriates to a legitimate tie persons who stand outside that strict line, find a necessary inference, or a very clear intention to that effect, it seems to me that the only weight one can give to such language is to treat it not so much as a canon of construction as a counsel of caution to warn you, in dealing with such cases, not to give way to guesses or mere speculation as to the probabilities of an intention, but to act only on such evidence as can lead a reasonable man to a distinct conclusion. But I protest, that as soon as you see upon the will, read by the light of such extrinsic circumstances as you may survey, what the true construction is, and what the true intention expressed by the testator is, then your journey is performed. You require no more counsellors to assist you; and after once arriving at the journey's end, to pause in giving effect to the true interpretation because, forsooth, the language has not been framed according to some measure or standard of correct expression, which is supposed to be imposed by judges out of regard for social or other reasons, appears to me to be using the language of such learned judges, not as laying down canons for construing a will, but as justifications for misconstruing it."

It is obviously impossible to give within the limits of a magazine article the substance of Lord Bowen's work, and I shall content myself with indicating those cases which best illustrate his methods. Any classification of forms of argument is necessarily tentative. A judgment may either contain in itself both principle and application, or it may express or even suggest only one of these, leaving the other to be implied. But whatever the outward

¹ *In re Jodrell*, 44 Ch. D. 614.

form of the argument may be, — whether pure development of principle without the citation of a single authority (*Allcard v. Skinner*¹), or elaborate analysis and review of a mass of conflicting cases (*Phillips v. Homfray*,² *Mitchell v. Darley Main Colliery Co.*³), a perfect example of systematic logic (*Ratcliffe v. Evans*,⁴ *Quartz Hill Gold Mining Co. v. Eyre*⁵), or a series of detailed answers to specific points urged in argument (*Carlill v. Carbolic Smoke Ball Co.*⁶), statutory construction (*Hewlett v. Allen*,⁷ *Thomas v. Quartermaine*⁸), or argument on the facts (*Medawar v. Grand Hotel Co.*,⁹ *Abrath v. Northeastern Ry. Co.*¹⁰), — we invariably find the same characteristic precision, sense of proportion, force and completeness of logic. Whatever the form might be, the result was well described by him in the course of his opinion in *In re Portuguese, &c. Mines*:¹¹ “As soon as one applies one’s mind to dissect the ingenious argument, the light breaks through and makes the case perfectly plain.”¹²

¹ 36 Ch. D. 145.

² 24 Ch. D. 439.

³ 14 Q. B. D. 125.

⁴ [1892] 2 Q. B. 524.

⁵ 11 Q. B. D. 674.

⁶ [1893] 1 Q. B. 256.

⁷ [1892] 2 Q. B. 663.

⁸ 18 Q. B. D. 685.

⁹ [1891] 2 Q. B. 11.

¹⁰ 11 Q. B. D. 440.

¹¹ 45 Ch. D. 60.

¹² Let me cite an example of simple exposition. In the case of *Smith v. Land & House Property Corporation*, 28 Ch. D. 14, the vendee under a contract for the sale of certain property was resisting an action for specific performance on the ground of misrepresentation, the vendor having stated that the property was let to “a most desirable tenant,” when in fact the tenant had been in arrears on his last quarter’s rent, and soon afterward went into liquidation: —

“It is material to observe that it is often fallaciously assumed that a statement of opinion cannot involve the statement of a fact. In a case where the facts are equally well known to both parties, what one of them says to another is frequently nothing but an expression of opinion. The statement of such opinion is in a sense a statement of a fact about the condition of a man’s own mind, but only of an irrelevant fact, for it is of no consequence what the opinion is. But if the facts are not equally well known to both sides, then a statement of opinion by the one who knows the facts best involves very often a statement of a material fact, for he impliedly states that he knows facts which justify his opinion. Now a landlord knows the relations between himself and his tenant; other persons either do not know them at all or do not know them equally well, and if the landlord says that he considers that the relations between himself and his tenant are satisfactory, he really avers that the facts peculiarly within his knowledge are such as to render that opinion reasonable. Now are the statements here statements which involve such a representation of material facts? They are statements on a subject as to which *prima facie* the vendors know everything and the purchasers nothing. The vendors state that the property is let to a most desirable tenant, what does that mean? I agree that it is not a guaranty that the tenant will go on paying his rent, but it is to my mind a guaranty of a different sort, and amounts at least to an assertion that nothing has occurred in the relations between the landlord and the tenant which can be considered to make the tenant an unsatisfactory one. That is an assertion of a specific fact. Was it a true assertion? Having regard to

As models of systematic logic nothing could be more admirable than his opinion in *Ratcliffe v. Evans*,¹ on the basis of the action for malicious falsehood; and his opinion in *Quartz Hill Gold Mining Co. v. Eyre*,² as to the circumstances under which an action will lie for the malicious prosecution of a civil action. See also his brief but masterly solution of the issue in *British Mutual Banking Co. v. Charnwood Forest Ry. Co.*³ These opinions must necessarily be read in their entirety to be appreciated.

His subtlety in the analysis of legal doctrine may be seen to best advantage in *Le Lievre v. Gould*,⁴ and *Angus v. Clifford*,⁵ where he reviewed the reasoning of the great case of *Peek v. Derry*,⁶ which settled the foundations of the action of deceit. What could be clearer, to give a single quotation, than his statement, in *Badeley v. Consolidated Bank*,⁷ of the way in which the lower court had gone wrong on an issue of partnership:—

“To my mind, the true test of partnership has been settled by the House of Lords, and by court after court, in a way which leaves it no longer open to discussion. The real test is that which is decided by a catena of cases beginning with *Cox v. Hickman*,⁸ and ending, I hope, with this case, though I am not sure of that. The question is whether there is a joint business, or whether the parties are carrying on business as principals and agents for each other. Now where has Mr. Justice Stirling gone wrong? He has gone wrong because he has not followed that test. What he has done is this. He has taken one of the circumstances which in many cases affords an ample guide to truth; he has taken that circumstance as if, taken alone, it shifted the onus of proof,—as if it raised a presumption of partnership,—and then he has looked about over the rest of the contract to see if he could find anything which rebutted that presumption. Now that cannot be a right way of dealing with the case. You have a group of facts,—A, B, C, D, E, and

what took place between Lady Day and Midsummer, I think that it was not. . . . In my opinion, a tenant who had paid the last quarter's rent by dribblets under pressure must be regarded as an undesirable tenant.”

Under the same head reference may be made to *Davies v. Davies*, 36 Ch. D. 392, where Lord Bowen showed the impossibility of enforcing a covenant on the part of a retiring partner to retire from the business “so far as the law allows.” See also his lucid exposition of the law relating to forbearance of threatened proceedings as a consideration for a compromise in *Miles v. New Zealand Co.*, 32 Ch. D. 291; and his statement of what is “new and original” within the meaning of the copyright law in *Saunders v. Weil*, [1893] 1 Q. B. 474.

¹ [1892] 2 Q. B. 529.

² 11 Q. B. D. 688.

³ 18 Q. B. D. 717.

⁴ [1893] 1 Q. B. 590.

⁵ [1891] 2 Ch. 470.

⁶ 14 App. Cas. 337.

⁷ 38 Ch. D. 262.

⁸ 8 H. L. Cas. 268.

F,—and you want to know the right conclusion to draw from them. The right way is to weigh the facts separately and together, and to draw your conclusion. It is not to take A, and say that if A stood alone it would shift the onus of proof, and then to look over B, C, D, E, and F and see if the remainder of the proof is sufficient to rebut the presumption supposed to be raised. The truth is, that all the cases which go beyond the line, or the test, or the definition, which has been explained once more by Lord Justice Cotton, are cases which depend on exploded fallacies. One fallacy after another has been exploded about the way in which to deal with these partnership cases, and no fallacy has been harder to kill than that about participation in profits. Of course, as the Lord Justice has pointed out, there may be cases in which participation in profits is enough to enable the court to decide the matter, but if you once lay down a principle of law that participation in profits is a determining factor, at that moment you depart from the region of law into the region of fact."

For the application of law to a case as a whole, uniting various methods in the treatment of diverse claims, *Maxim Nordenfelt Gun & Ammunition Co. v. Nordenfelt*,¹ and *Mogul Steamship Co. v. McGregor*,² are the best examples of Lord Bowen's work. Indeed, these two opinions are the most brilliant that he ever delivered; and they have the additional interest of dealing with general and timely issues. The former case settled the law relating to contracts in restraint of trade, and the latter laid down the legal limits of trade selfishness by way of combination to suppress competition. Other notable instances of systematic treatment on a large scale are *Le Lievre v. Gould*,³ on the limits of the law of negligence; *Carlill v. Carbolic Smoke Ball Co.*,⁴ an elaborate discussion of the law relating to the formation of contracts; and *Hutton v. West Cork Ry. Co.*,⁵ on the powers of the majority over corporate funds.⁶

¹ [1893] 1 Ch. 631.

² 23 Q. B. D. 598.

³ [1893] 1 Q. B. 498.

⁴ [1893] 1 Q. B. 265.

⁵ 23 Ch. D. 669.

⁶ The cases thus far mentioned have been selected primarily with reference to style and method. For Lord Bowen's substantial contributions to English law, I would cite the following cases: *Maxim Nordenfelt Gun & Ammunition Co. v. Nordenfelt*, [1893] 1 Ch. 631, which settled the law as to contracts in restraint of trade; *Mogul Steamship Co. v. McGregor*, 23 Q. B. D. 598, on the limits of trade selfishness by way of combination to exclude rivals; *Thomas v. Quartermaine*, 18 Q. B. D. 685, on the duty of owners of premises, and the doctrine *volenti non fit injuria*; *Le Lievre v. Gould*, [1893] 1 Q. B. 491, on the limits of the law of negligence; *Ratcliffe v. Evans*, [1892] 2 Q. B. 524, on the evidence admissible to sustain an action for defamation; *Finlay v. Chirney*, 20 Q. B. D. 494, and *Phillips v. Homfray*, 24 Ch. D. 453, on the *maxim actio*

Finally, in addition to the characteristics to which I have adverted, which Lord Bowen shared in degree with his contemporaries, in his knowledge of legal history and mastery in the application of the doctrine of evolution to legal and political philosophy he was unique. "The only reasonable and the only satisfactory way of dealing with English law," he said in an address to law students, "is to bring to bear upon it the historical method. Mere legal terminology may seem a dead thing. Mix history with it, and it clothes itself with life." In the application of this method he treated law and legal history with an acuteness and sympathetic grasp which indeed vitalize his conclusions. English law consists of two well defined elements, the rational or scientific, and the historical, and many errors and much confusion in the administration of the law have been due to an attempt to give a rational or scientific basis to doctrines which owe their origin to historical accidents.¹

A brief illustration of Lord Bowen's use of this method is the

personalis moritur cum persona; Dalton v. Angus, 6 App. Cas. 779, on the right to subjacent support; Carlill v. Carbolic Smoke Ball Co., [1893] 1 Q. B. 256, on the essential requisites to the formation of a contract; Cochrane v. Moore, 25 Q. B. D. 57, on the vexed question of the passing of property by voluntary gift; Smith v. Land & House Property Corporation, 28 Ch. D. 7, on actionable misrepresentation; *In re Hodgson*, 31 Ch. D. 177, on the rights in equity of creditors of joint debtors; Quartz Hill Gold Mining Co. v. Eyre, 11 Q. B. D. 674, on malicious prosecution as a cause of action; Brunsden v. Humphrey, 14 Q. B. D. 141, and Mitchell v. Darley Main Colliery Co., 14 Q. B. D. 125, on the doctrine of *res judicata*; Jacobs v. Crédit Lyonnaise, 12 Q. B. D. 598, on the *lex loci contractus* and *vis major*; Johnstone v. Milling, 16 Q. B. D. 460, on the limits of repudiation as a breach of contract; Merivale v. Carson, 20 Q. B. D. 275, on the distinction between fair public comment and privileged communications in the law of libel; Newbigging v. Adam, 34 Ch. D. 582, on relief in equity in cases of fraud and misrepresentation; Angus v. Clifford, [1891] 2 Ch. 449, on actionable misrepresentation; Allcard v. Skinner, 36 Ch. D. 145, on undue influence; Speight v. Gaunt, 22 Ch. D. 727, on the duties of trustees; Hammond v. Bussey, 20 Q. B. D. 93, applying the doctrine of Hadley v. Baxendale, 9 Ex. 341; Castellian v. Preston, 11 Q. B. D. 397, on the recovery under fire insurance policies; Steinman v. Angier Line, [1891] 1 Q. B. 619, on recovery under a bill of lading for loss by theft; Svensden v. Wallace, 13 Q. B. D. 69, on the scope of general average contribution; Abrath v. Northeastern Ry. Co., 11 Q. B. D. 440, on the nature of the burden of proof; Hutton v. West Cork Ry. Co., 23 Ch. D. 654, on the corporate power to remunerate directors for past services; Baroness Wenlock v. River Dee Co., 36 Ch. D. 684, on the limits of the corporate capacity to contract; *In re Portuguese Consolidated Copper Mines*, 45 Ch. D. 16, on the doctrine of ratification; British Mutual Banking Co. v. Charnwood Forest Ry. Co., 18 Q. B. D. 714, on liability for fraudulent acts of an agent.

¹ As an indication of the value of the historical method in controverted questions, compare Lord Cairns's opinion in Fletcher v. Rylands, L. R. 3 H. L. 330, with that of Mr. Justice Doe in Brown v. Collins, 53 N. H. 442.

following introduction to his decision in a *nisi prius* action for illegal restraint, in which it was claimed that the landlord had broken an outer door.¹

"The doctrine of the inviolability of the outer doors of a house and its precinct has long been established by English law. The principle is one which carries us back in imagination to wilder times, when the outer door of a house, or the outer gates and enclosures of land, were an essential protection, not merely against fraud, but violence. The proposition that a man's house is his castle, which was crystallized into a maxim by the judgment in *Semayne's case*,² and by Lord Coke, dates back to days far earlier still, when it was recognized as a limitation imposed by law on all process except that which was pursued at the King's suit and in his name. A landlord's right to distrain for arrears of rent is itself only a survival of one among a multitude of distraints which, both in England and other countries, belonged to a primitive period when legal procedure still retained some of the germs of a semi-barbarous custom of reprisals, of which instances abound in the early English books, and in the Irish *Senchus Mor*. Later, all creditors and all aggrieved persons who respected the King's peace, the sheriff in a civil suit, and the landlord in pursuit of his private remedy for rent and services, were both of them held at bay by a bolted door or barred gate. To break open either was to deprive the owner of protection against the outer world for his family, his goods and furniture, and his cattle."

His history of the common law doctrine as to restraint of trade in *Maxim Nordenfelt Gun & Ammunition Co. v. Nordenfelt*,³ is his most elaborate contribution to the historical method. In *Finlay v. Chirney*,⁴ he gives a graphic history of the maxim *actio personalis moritur cum persona*. By comparing this opinion with the wholly practical opinion of the Master of the Rolls in the same case, one may observe the advantage of the historical point of view. In *Steinman v. Angier Line*,⁵ where the issue was the liability under the bill of lading of a ship owner for goods stolen by the stevedore's men during stowage, Lord Bowen clears up the construction of the exceptions in the bill of lading by a sketch of the history of the introduction into English policies and English bills of lading of special provisions as to "thieves."⁶

¹ *American Concentrated Must Corporation v. Hendry*, 62 L. J. Q. B. 389.

² 5 Co. Rep. 91. ³ [1893] 1 Ch. 631. ⁴ 20 Q. B. D. 502. ⁵ [1891] 1 Q. B. 621.

⁶ Other specimens of this method may be found in *Brunsdon v. Humphrey*, 14 Q. B. D. 141; *Dalton v. Angus*, 6 App. Cas. 779; *Dashwood v. Magniac*, [1891] 3 Ch. 306; *Hannay v. Smurthwaite*, [1893] 2 Q. B. 422.

It has been charged that Lord Bowen suffered from excess of intellectual light; that his refinements were often too subtle for application in the practical administration of the law. The Master of the Rolls, for instance, on the occasion to which I have already alluded, plainly intimated as much when he said, "I cannot fail to say that the workings of his mind were so beautifully fine that sometimes what he said escaped me." Without denying that by reason of the compactness of his arguments Lord Bowen's opinions require attentive consideration, the extent of the difficulty experienced by the Master of the Rolls may be observed in *Thomas v. Quartermaine*,¹ where Lord Esher dissented. In the subsequent case of *Yarmouth v. France*,² in which the doctrine of *Thomas v. Quartermaine* was involved, Lord Esher examines at length the opinion of Lord Bowen in the latter case, and is still dissatisfied with a line of reasoning which plainly enlists the admiration of Lord Justice Lindley. Another instance of this alleged refinement, in which the merits of the controversy may be compared, is his review of Lord Justice Fry's theory of the law relating to contracts in restraint of trade, in the *Maxim Nordenfelt* case.³ See also *Miles v. New Zealand Co.*,⁴ where he dissented on the facts. Compare his opinion in *Vagliano v. Bank of England*,⁵ and in *Pandorf v. Hamilton*,⁶ with the opinions given in the House of Lords reversing his judgment.

No better proof of the practical bent of his mind can be offered than the fact that he seldom found himself in irreconcilable conflict with his colleagues. In his whole career he did not dissent from the opinion of the majority a dozen times. How much of this result was brought about by consultation is, of course, unknown. But we have the testimony of Lord Justice Fry, that "the pains which he took both to do his own part in the administration of justice to the very best of his great abilities, and so far as he could to secure the best workings of the machinery of the law, were infinite. He never wearied of investigating or discussing a point so long as he thought that anything remained to be got at, or that there was any hope of bringing about an agreement of opinion amongst colleagues who were inclined to differ."

On occasion, especially in equity cases, he was ready to yield a reluctant assent to the majority: —

¹ 18 Q. B. D. 694.

² 19 Q. B. D. 654.

³ [1893] 1 Ch. 631.

⁴ 32 Ch. D. 291.

⁵ 23 Q. B. D. 243.

⁶ 17 Q. B. D. 670.

"The only point on which I have some hesitation is this: I am not certain, if I had been sitting by my own unassisted—I will not say light, but twilight—that I should have come to the same conclusion as to the costs of the trial below. But it is a matter with which my brothers are so much better fitted to deal than I am, that I willingly yield my views about it to theirs."¹

But when it came to a matter of principle he could be firm and independent, though always extremely courteous.² A good illustration is the case of *In re Cape Breton Co.*,³ where he began a vigorous dissenting opinion by saying:—

"In this case I feel hesitation in differing from my learned brethren, whose knowledge of the doctrines of courts of equity is so much greater than mine, but as I cannot understand the principle upon which relief has been refused, it becomes necessary for me to state my views."⁴

Beneath all his courtesy and gentleness of manner, however, there was the strength of a Blackburn or a Jessel. An unconscionable case or an idle argument never escaped his severity. See, for instance, his opinion in *Brown v. Burdett*,⁵ an administration suit, in which "all the oyster had been eaten, and only the shell remained." And in *Thomas v. Quartermaine*,⁶ where a senseless construction of the Employers' Liability Act was urged in argument, he disposed of the point in short terms:—

"An enactment which distinctly declares that a workman is to have the same rights as if he were not a workman, cannot, except by violent distention of its terms, be strained into an enactment that the workman is to have the same rights as if he were not a workman, and other rights in addition. It cannot, in the case of a defect in the employer's works, be distorted into the meaning that a new standard of duty is to be imposed on the employer as regards a workman, which would not exist as regards anybody else. If the language of the section were not even so precise, the point would be concluded, one might well think, by the observation that, if the act had intended to prescribe some new measure of duty, the least one might expect would be that it should define it. What sort of duty could that be which does not exist at law, and which is not

¹ *Tomlin v. Luce*, 43 Ch. D. 196.

² *Thomas v. Quartermaine*, 18 Q. B. D. 685, and *Newbigging v. Adam*, 34 Ch. D. 582.

³ 29 Ch. D. 806.

⁴ For other dissents, in addition to those already mentioned, see *Burdick v. Sewell*, 13 Q. B. D. 159; *Rendall v. Blair*, 45 Ch. D. 139; *Dreyfus v. Guano Co.*, 43 Ch. D. 317.

⁵ 40 Ch. D. 267.

⁶ 18 Q. B. D. 685.

defined by statute? It would be a duty that had no limits, except the benevolence of a jury exercised at the expense of the pockets of other people."

The truth is, that Lord Bowen's unusual intellectual acquirements were well balanced by good sense. He was continually using the terms common law and common sense as equivalents; he likened the common law to an "arsenal of sound common sense principles."¹ No end of examples of this characteristic might be given. He had a marked aversion to artificial and technical construction. In speaking of the standard to be used in weighing the evidence in a case involving the question whether a certain hospital was an "annoyance" to the inhabitants of neighboring houses within the meaning of a covenant in a building lease, he said:—

"'Annoyance' is a wider term than nuisance, and if you find a thing which really troubles the mind and pleasure, not of a fanciful person or of a skilled person who knows the truth, but of the ordinary sensible English inhabitant of a house,—if you find there is anything which disturbs his reasonable peace of mind, that seems to me to be an annoyance, although it may not appear to amount to physical detriment or discomfort. You must take sensible people; you must not take fanciful people on the one side or skilled people on the other; and that is the key as it seems to me of this case. Doctors may be able to say, and, for anything I know, to say with certainty, that there is no sort of danger from this hospital to the surrounding neighborhood. But the fact that some doctors think there is, makes it evident at all events that it is not a very unreasonable thing for persons of ordinary apprehension to be troubled in their minds about it. And if it is not an unreasonable thing for any ordinary person who lives in the neighborhood to be troubled in his mind by the apprehension of such risk, it seems to me that there is danger of annoyance, though there may not be a nuisance."²

Along with his singular power of expression Lord Bowen displayed real imagination. Imagination, after all, is for the most part simply depth and breadth of insight; and so far from being detrimental to judicial thought, surely no quality could be more desirable in the administration of law than the intellectual and imaginative insight which goes to the heart of things and expresses

¹ *Mogul Steamship Co. v. McGregor*, 23 Q. B. D. 611.

² *Tod-Heatly v. Benham*, 40 Ch. D. 97. See also *Jackson v. Barry Ry. Co.*, [1893] 1 Ch. 238, and *Miller v. Hancock*, [1893] 2 Q. B. 180.

in perfect form a rule for future guidance. Undoubtedly, in much of Lord Bowen's work as a judge no such great powers were called into play; but in those great cases where the discussion goes to the scientific and historical foundation of legal principles we witness the luminous effect of a powerful imagination at work among the dry bones of legal formulæ.

One may regret that Lord Bowen's labors did not fall into lines which would have given more general scope to his high powers; but, from all that I have been able to learn of his character, I am sure that he would consider his laborious life amply rewarded by the tribute of his friend and colleague, Mr. Justice Wright, who said that "he fulfilled the highest ideal of public justice."

Van Vechten Veeder.

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INJUNCTIONS FOR PUBLIC PURPOSES. — A matter of great popular interest at the present time, the extent of the power of the courts to issue injunctions, at the suit of the government, in restraint of public nuisances, is well discussed by the Texas court in the recent case of *State v. Patterson*, 37 S. W. Rep. 478. In this case the State brought a bill for an injunction against the keeper of a common gambling-house. The court refused to grant the injunction, on the ground that the case was a purely criminal one, in which it did not appear that any irreparable injury to property or civil rights was threatened. In this conclusion the court was doubtless right. The opinion of Mr. Justice Neill is of great value, however, as showing the true extent of the power to issue injunctions in such cases. It is there strongly asserted, in contradiction to a notion now generally current, that the mere fact that acts enjoined would constitute, if committed, a criminal offence, is no reason why courts of equity should not interfere to prevent their occurrence. And it is also distinctly recognized throughout the opinion that the irreparable injury which the court will interfere to prevent need not be an injury to tangible property, but may be an injury to the civil rights of a private person or of the public. In taking this broad view of the proper use of injunctions the Supreme Court of Texas approves the unanimous opinion of the Supreme Court of the United States in the important case of *In re Debs*, 158 U. S. 564. That these cases are now established law is shown by the very fact that a bill has been proposed in Congress to cut down by statute the power of the Federal courts to enforce such injunctions.

RECOVERY OF RENT UNDER AN ULTRA VIRES LEASE. — The New York Court of Appeals has further indicated its position on the troublesome doctrine of *ultra vires* in *Bath Gaslight Co. v. Claffy*, 45 N. E. Rep. 390. Plaintiff, a gas company, executed an *ultra vires* lease of its entire plant and franchises. The lessee after occupying for some time

made default in the payment of rent, and finally the lessor resumed possession. This was an action against a surety, on a bond conditioned for the performance of the lessee's covenants, to recover the amount of the rent that accrued while the lessee was in actual possession. The court, Vann, J. dissenting, affirms the judgment for the plaintiff, going squarely on the theory that the lessee was liable to this extent on the lease. In delivering the opinion of the majority, Andrews, C. J., says, "We think the demands of public policy are fully satisfied by holding that, as to the public, the lease was void, but that, as between the parties, so long as occupation under the lease continued, the lessee was bound to pay the rent, and that its recovery may be enforced by action on the covenant." This is not affected by the *quasi* public nature of the corporation. Whether a lessee can escape further liability on the lease by abandoning possession is left an open question.

This decision throws additional light on the court's view of the requirements of public policy. Direct proceedings by the State afford sufficient remedy for violations of the charter, while honesty and fair dealing demand that payment should be made for benefits received. To reach this result by implying a contract, after holding the actual contract void, is mere evasion. This result is in line with the position taken by Mr. Morawetz. As the elements of contract are present and there is no illegality in the proper sense, to allow recovery on the contract where either party has performed best satisfies the requirements of public policy. Until there is performance the contract is voidable. 2 Morawetz, Corp., §§ 650, 685, 689.

But where shall the line be drawn? If the contract is good in part, will the court give damages for breach of the unexecuted part? If so, what performance will be required to bring about this result? It has often been said that performance cannot give validity to that which is void in its inception. Mr. G. W. Pepper, in an article in 9 HARVARD LAW REVIEW, 255, 269, points out theoretical difficulties that confront a court, which, taking this view of public policy, is yet unwilling to hold all corporate contracts binding upon the parties.

CONDITIONS IN RESTRAINT OF MARRIAGE. — A condition annexed to a testamentary gift, to the effect that, if the donee marries, the property shall vest in another, is void as against public policy, and the gift is treated by the courts as absolute. Stated in its baldest form, the rule is this, that conditions in general restraint of marriage are illegal. Simple and intelligible as this appears at first sight, the subtleties it has given rise to are endless. For example, one who explores the mysteries of the doctrine meets at the outset a well established exception. If the gift is to a widow or widower the condition is valid, that is, the rule does not apply to second marriages. An illustration of this is to be found in the late Tennessee case of *Herd v. Catron*, 37 S. W. Rep. 551, where a testator devised land to his widowed daughter with a proviso that, if she married again, the land should go to her son. She did marry, and the court held that the gift over took effect. The reason for the general rule is of course to be found in the injury which the promotion of celibacy inflicts upon the state. The prevention of second marriages is naturally not deemed such an injury, and this exception to the rule is universally recognized.

Difficult questions often arise in determining what is a "general" re-

straint of marriage. While conditions against marrying without consent (*In re Smith*, 44 Ch. D. 654), or before some reasonable age (*Yonge v. Furze*, 8 D. M. & G. 756), or against marriage with a person of a certain nationality (*Perrin v. Lyon*, 9 East, 170), are valid, a condition against marrying any man who is not seised of a freehold worth £500 a year has been held to be too general, and therefore void (*Keily v. Monck*, 3 Ridg. P. C. 205). All that can be said is that the condition, even if not in complete restraint of marriage, must not *unreasonably* restrict the freedom of the donee. Story, Eq. Juris. § 280.

Although the condition be not expressed in so many words, if the natural operation of the gift is to restrain marriage, courts will treat the implied condition as illegal to the same extent as an express condition. But in cases of provision for support until marriage, they will not be astute to imply such a condition. A *bona fide* bequest during celibacy is good; "for the purpose of intermediate maintenance will not be interpreted maliciously to a charge of restraining marriage." *Scott v. Tyler*, 2 Dick. 712, 722.

The most refined subtlety in the whole doctrine, however, is to be found in the so called *in terrorem* principle. In case of gifts of personal property, where there is a condition subsequent, which is only in partial restraint of marriage, and hence is valid in itself, and there is no gift over, courts have held that the failure to dispose of the residue of the property shows that the condition was inserted by the testator merely for the influence it might have on the donee, to alarm him, as it were, and have refused to allow a forfeiture in case of breach. This doctrine "explores in slippery places," and the reasons given for it savor of excessive refinement. Schouler on Wills, § 603. The entire subject of conditions in restraint of marriage is well treated in 2 Jarman on Wills, 5th ed., 885-898; and in the note to *Scott v. Tyler*, 2 White & T. Lead. Cas. Eq., 5th ed., 179-205.

THE BRAM TRIAL. — The case of *United States v. Bram* will stand as one of the great murder trials of the day. From the night in July, when the triple murder on the barkentine Herbert Fuller was committed, to the conclusion of the trial before the United States Circuit Court at Boston there has been a succession of sensational incidents. An atmosphere of mystery, not yet entirely dispelled, has enveloped the whole affair. It is not surprising that a large portion of the New England public became absorbed in the reports of the proceedings as in a matter of almost personal moment. Those who attended the trial received impressions not soon to be forgotten. Unusual circumstances gave vivid color to the remarkable case; — the trying position of the young passenger, the dazed uneasiness of the sailor witnesses, the striking personal appearance of the defendant, and his admirable bearing on the witness stand during the ordeal of long cross-examination. Legally the most salient features were the endeavor of the defence to have excluded the testimony of the principal witness for the prosecution, and the attempt of the government to show motive by evidence of occurrences entirely unconnected with the case in point of time and surroundings. Most remarkable and interesting of all was the verdict of "Guilty" reached by the jury after twenty-six hours of deliberation, and in light of the fact that no reason for the crime had been presented. The strong popular disapproval of the result

expressed itself in attacks on the court, the jury, the district attorney, and the criminal law in general.

It is impossible within the limits of this note to review the evidence even briefly; but of those who intelligently followed the course of the trial, few doubted the justice of the verdict. The jury in arriving at their decision performed a courageous act, and it is to be deplored that the conduct of certain of its members since their dismissal has not been equally deserving of commendation. Perhaps a suggestion as to the probable cause of the popular clamor will not be out of place. The public mind does not work logically. The element of seeming unreliability in the testimony of the government's chief witness, Charles Brown, furnished perhaps a reason for doubting the defendant's guilt as established by that particular evidence. It afforded no good grounds, however, for entirely neglecting the circumstantial evidence which in the opinion of the majority of trained lawyers was amply sufficient to support the verdict. And yet this was the unconscious line of reasoning taken by the majority of those who denounced the finding of the jury. It indicates what is the root of the difficulty. People generally refuse to realize that proof beyond a reasonable doubt is precisely the same thing, whether the result is to be a fine, imprisonment, or death. Yet the fact is fairly obvious. The degree of punishment of a crime does not affect the logically probative force of the evidence, and a defendant is not innocent because his life is at stake. But the public thinks to compensate for its fallacious reasoning on the ground that it errs on the side of mercy. This is not so. The pitiable situation of a defendant on trial for a capital crime is not to be denied; but on the score of mercy, the stifling sensation which unpunished murder raises in the minds of perfectly innocent members of the community, especially in the weak and helpless, is entitled to greater consideration. As has often been pointed out, exaggerated sympathy with an accused is neither sensible nor kind; it is not well considered and does not rest on a sound foundation; it overlooks the fact that an important duty of the law is to punish the guilty.

THE CONSTITUTIONALITY OF MINORITY REPRESENTATION. — The advisability of the adoption of some scheme of minority representation is a constant theme of discussion among political reformers. The constitutional aspect of the question is often overlooked. That there may be grave doubts in some of our States whether a system providing for representation of the minority can be formulated, which will not conflict with the provisions of the State Constitution relative to the electoral franchise, is shown by the opinion recently written by Judge John F. Dillon,¹ to whom the question was referred by the committee for the preparation of a charter for Greater New York. The New York Constitution, Article II., Section I., provides that "every male citizen of the age of twenty-one years . . . shall be entitled to vote . . . in the election district of which he shall at the time be a resident, and not elsewhere, for all officers that now are, or hereafter may be, elective by the people." This provision will of course be guarded by the courts with the utmost watchfulness. It was under the precisely similar section in the previous Constitution that the Court of Appeals, in *Matter of Gage*, 141 N. Y. 112, held that

¹ The opinion is printed in full in the Albany Law Journal for November 28, p. 346

the act of 1892 conferring upon women the right to vote for school commissioners, was unconstitutional. Under substantially the same provision in the Ohio Constitution, the Supreme Court of that State, in *The State v. Constantine*, 42 Ohio St. 437, held that a statute providing for the election of four police commissioners and permitting each elector to vote for but two, was unconstitutional. Judge Dillon comes to the conclusion that an act providing for minority representation, in which the right of all electors to vote for every elective officer should be provided for, and which should give effect to the voice of the majority, would not violate the Constitution. This apparently points to some system of cumulative voting as the proper one to be adopted in order to avoid constitutional objections. Experiments in that direction, as Judge Dillon says, have occasionally been made. In England an act passed in 1870 provided that in the election of school boards "every voter shall be entitled to a number of votes equal to the number of members of the school board to be elected, and may give all such votes to one candidate, or distribute them among the candidates, as he sees fit." The similar provisions of the Illinois Constitution relative to the election of members of the House of Representatives, is one of the rare instances of the adoption in this country of a scheme of minority representation.

LIABILITY FOR RENT AFTER DESTRUCTION OF PREMISES.— Well known principles of the law of real property are extended to decidedly novel circumstances in the interesting recent case of *Waite v. O'Neil*, 76 Fed. Rep. 408. The plaintiff owned land bordering on the Mississippi River, at a place where a narrow strip of low land lay along the shore at the foot of a high bluff. She leased to the defendants "the river front and landing in front of the lot, with ample space for a roadway along the landing." By a sudden and extraordinary change in the course of the river, the strip of low land and a part of the bluff were swept away; so that the river now flows at the foot of a bank over sixty feet high, so undermined that no vessels could safely approach it, and quite incapable of being made into a safe landing place. More than this, a system of works has been erected in the river along this shore by persons acting with the authority of the lessor, to repair the damage done by the stream, which would entirely prevent any access to the bank. The lessor now insists, among other demands, on the payment of the stipulated rent. In considering this demand, the first question to be decided is as to the nature of the property leased. The court considers, having regard to the whole language of the lease and all the circumstances, that no portion of the land was leased, but only an incorporeal right appurtenant to the land, to have a "landing" on the river front, with a right of way to it. According to the well established though severe rule of law that no impairment of the value of property will release the lessee from his liability to pay the stipulated rent, the lessees in this case must pay full rent for the right leased to them, however little it is now worth; unless, indeed, they can show that this right, the subject matter of the lease, has been totally destroyed. In the latter case the liability for rent is necessarily extinguished, as is shown by the cases of a lease of a room in a building afterwards burnt down. *Graves v. Berdan*, 26 N. Y. 498.

Strictly speaking, if the lessees acquired all the lessor's rights as a riparian owner, such rights would appear to be still in existence, though

now worthless, and they are bound to pay full rent for them. The court hold, however, that the subject matter of the lease was in reality only a "landing," and now that no landing can fairly be said to exist, this subject matter is wholly gone. This view will probably commend itself to all as highly sensible, though a point is left open to speculation as to the right the lessees would have had to use a practicable landing at a new place, supposing the course of the flood had left such a landing. Even if a landing could still be considered as existing after the catastrophe, the court further hold that the acts done by the lessor, or by her authority, give the lessees good cause to consider themselves evicted from the property leased, and therefore released from the liability for rent. This is an extension of the application of the term "eviction" to a case where the lessee is deprived of the enjoyment, not of land leased, but of an incorporeal right leased. Just such a case has perhaps never before arisen, on account of the rarity of leases of incorporeal rights; but there seems to be no reason why the lessor's conduct here should not be described and treated as an eviction.

ADVERSE POSSESSION BY A RELATIVE. — As a practical matter, more is required to warrant finding possession adverse when the possessor and owner are relatives than when they are mere strangers. But the statement of the Supreme Court of Minnesota in *O'Boyle v. McHugh*, 69 N. W. Rep. 37, 38, that the relation of parent and child "radically modifies the general rules of law as to what constitutes adverse possession between strangers," is unfounded in reason, and is not supported by the authorities. The only legitimate effect of the relationship is to give rise to an inference that the possession was permissive. To say that there is a presumption of this is not so objectionable, though it adds little, since the particular facts of the actual relationship must determine the force of the inference in each case. Frequently, the mere fact of family connection must be entirely disregarded because of the actual relations between the parties. There is the further difficulty that no indication is given as to the degree of relationship necessary to bring the case within the rule laid down. It seems as though the court considers that there is an analogy to adverse possession by a tenant in common, or by a person lawfully in possession who secretly determines to hold as owner.

This question is well dealt with in *Allen v. Allen*, 58 Wis. 202, 210, where it is said that the relationship is "another fact in the case which makes strongly against the claim" of an adverse and hostile possession. "In such case mere possession . . . would not have the same force in proving an adverse entry and holding as it would in the case of mere strangers." And so in *Silva v. Wimpenny*, 136 Mass. 253, a case where the trial court ruled that title by adverse possession had not been gained, on appeal Mr. Justice Holmes took up the facts of the case and weighed them in the light of the relationship.

MAY A SURGEON DISREGARD THE INSTRUCTIONS OF HIS PATIENT? — Interesting questions as to the extent of a surgeon's authority to follow his best judgment in the course of an operation are suggested by the recent English case of *Beatty v. Cullingworth*. (Queen's Bench Division,

before Mr. Justice Hawkins and a special jury. Reported in the London Times, Aug. 11, Nov. 18, 19, 1896.) The material facts of the case were as follows. The defendant performed the operation of double ovariectomy on the plaintiff, a single woman at that time engaged to be married. Just before the operation Miss Beatty told the defendant that if both ovaries were found to be diseased he must remove neither. He replied, "You must leave that to me." The plaintiff denied hearing this remark. When she learned that Dr. Cullingworth had taken out both ovaries, she broke her engagement, and later brought the suit in question for malpractice and assault. The jury promptly found a verdict for the defendant. As a point of law, the question seems to have been inadequately considered, the charge of Mr. Justice Hawkins being little more than a direction to the jury that there was tacit consent to the operation.

It is difficult to sustain the verdict on the grounds taken. The facts, involving a direct prohibition, would seem to exclude the possibility of implying consent. But there is the better justification of public policy. When such connection between patient and surgeon is established that it is proper for the latter to act, he may lawfully, in the absence of consent, perform an operation which the necessity of the occasion seems to his careful judgment to require. Stephen, Digest of Criminal Law, 5th ed., p. 164, Art. 226. It is true that this does not cover a case where there is express prohibition by one rationally capable of deciding and having knowledge of the circumstances. But in this case, judging from the evident reason or cause of the instructions, the plaintiff did not have a sufficient knowledge of the facts. For the advanced stage of disease which made removal of the ovary appear necessary to a competent surgeon itself rendered the organ practically useless, as well as dangerous. Such, at least, appears to be the general medical opinion. After all is said, however, undoubtedly the defendant's wisest course would have been to refuse to operate in such a case, when hampered by hard and fast limitations. Certainly this is the course that would be adopted under similar conditions by the better class of surgeons in this country.

MORE UNFAIR COMPETITION CASES. — Never were unsuccessful traders more prone than at present to seek an easy path to prosperity by copying the business name of a more fortunate rival, or by "dressing up" their wares to look like his, in the hope of enticing away a part of his trade. The courts continue to be flooded with these so called "unfair competition" cases. Three decisions, illustrating different aspects of the subject, have been reported within a month. In *Buck's Stove & Range Co. v. Kiechle*, 76 Fed. Rep. 758, the defendant, it appeared, was making stoves with white enamel lining on the inside of the doors, in imitation of those long manufactured and sold by the plaintiff, with the fraudulent purpose and result of palming them off upon the trade and the public as the manufacture of the latter. He was promptly enjoined from continuing in that line of business. In *Fairbank Co. v. Bell Mfg. Co.*, reported in the New York Law Journal for December 14, the defendant discovered that the plaintiff's soap powder was finding an extensive market, and so determined to put up his own powder in a package of a very similar sort to that employed by plaintiff. He carried out his plan for some time with considerable success, but he too has now been enjoined. In *Mossler v. Jacobs*, reported in 7 Chicago Law Journal,

886, the "Six Little Tailors" procured an injunction estraining another firm from doing business under the name of "Six Big Tailors." And the end is not yet. Injured traders will be forced to seek the aid of the law until doomsday unless the code of business morality prevalent among a large class of our citizens becomes greatly changed. The cases on the subject are surprisingly numerous. The whole topic was treated at length, with full citation of authorities, in Mr. Mitchell's article in the last number of the REVIEW.

INTERSTATE COMMERCE AND THE POLICE POWER. — Two recent decisions of the United States Supreme Court raise again the vexed question of what are the limits of a State's power of legislation in matters touching interstate commerce. *Illinois Cent. R. R. Co. v. State of Illinois*, 163 U. S. 142, holds unconstitutional a local statute which compels all trains to stop at county seats. The court properly rests its opinion on the ground that such an enactment, though purporting to be a police regulation, was in reality a most unreasonable interference with interstate commerce, unnecessarily delaying fast mail trains, and oftentimes forcing them to go several miles out of their regular route. (See *Henderson v. Mayor of the City of New York*, 92 U. S. 259, 268.)

The other and more important case of *Hennington v. State of Georgia*, 163 U. S. 299, decides that a State law forbidding the running of freight trains on Sunday is valid, although its effect is to prevent interstate trains from passing through the State on that day. The decision was not a unanimous one. But this was hardly to be expected in view of the previous divisions of the same court on similar questions. *Bowman v. Chicago & Northwestern Ry. Co.*, 125 U. S. 465; *Leisy v. Hardin*, 135 U. S. 100; *Plumley v. Commonwealth of Massachusetts*, 155 U. S. 461. And the difference of opinion existing upon the precise question decided in *Hennington v. State of Georgia* is well illustrated by the fact that, in the only two instances in which this exact point has hitherto come before the courts, the decisions have been squarely opposed to each other. *State v. R. R. Co.*, 24 W. Va. 783; *Norfolk & Western R. R. Co. v. Commonwealth*, 88 Va. 95.

The *ratio decidendi* advanced in the principal case is, that the Sunday law was a legitimate exercise of the State's acknowledged power to protect the health and morals of its own citizens, and that it affected interstate commerce only incidentally. In determining the extent of a State's authority in matters which concern the commerce of other States, it seems to be generally admitted that, if Congress has passed laws on the same subject, these are superior to any State statute. *Cooley*, Const. Lim., 6th ed., 722, 723. But the point of difficulty is where, as in *Hennington v. State of Georgia*, and as is generally the fact, Congress has been silent. How far can the State then go in enacting such laws as relate to foreign or interstate commerce? Two tests by which to answer this question have been suggested. The first makes the intention of the State legislature the final criterion. It says that, if the object of the legislature is simply to promote the physical or moral welfare of the local community, then no matter what the real consequence upon commerce may be, the law is merely a police regulation and therefore valid. See article in 1 HARVARD LAW REVIEW, 159. This theory, however, in the light of recent decisions, can hardly be said to have been

received with favor. The operation of the law rather than the object of the legislature is the important consideration. The other test, which has been acted upon by the courts, and which may be regarded as well established, is this. Is the subject matter of the law of such a nature as to admit only of one uniform system throughout the country? If so, the power of Congress to enact laws is absolutely exclusive. But if the subject is one which does not require national uniformity, one upon which different regulations would be suitable, varying according to the diverse interests and conditions of particular places, the State may legislate. *Cooley v. Board of Wardens*, 12 How. 299, 319. As an application of this principle, State legislation on the subject of quarantine, inspection regulations, and the construction of bridges over navigable streams, is held constitutional, though such legislation directly affects interstate commerce.

Now, accepting this last test as the correct one, who is to decide whether the subject covered by a State statute needs national or local treatment? The determination of this question should rest with the Federal Legislature. For the answer turns on many considerations of practical expediency, which are pre-eminently matters for legislative investigation. Since Congress by the express terms of the Constitution is given the power to regulate commerce among the States, it seems that Congress, and not the courts, should have the supervisory action over such State legislation as has to do with interstate commerce. It may then be doubted whether the judiciary should interpose in any given case to pronounce a State regulation of commerce unconstitutional, unless it appears beyond a doubt that the subject of legislation is one requiring national uniformity, leaving to Congress its undoubted right to annul the effect of the law by its own subsequent enactments. 2 Thayer's Cases on Constitutional Law, 2190, 2191.

It is true that the court has not always taken this position, as is shown by the great case of *Leisy v. Hardin*, *supra*. But the more recent decisions of *Plumley v. Commonwealth of Massachusetts*, *supra*, and *Hennington v. State of Georgia*, seem to indicate that perhaps that case is in danger. The personnel of the United States Supreme Court has changed much in the six years since *Leisy v. Hardin* was decided. Four of the six judges then in the majority are no longer on the bench. Is it not possible that the court is gradually getting away from that decision,—that the judges who were then in the minority, and who would seem to have been right on principle, are now gaining the upper hand?

RECENT CASES.

CARRIERS—LIABILITY OF OWNERS OF STEAMBOATS AS INNKEEPERS.—The plaintiff, a passenger on the defendant's steamboat, had upon his person \$160 in money for the expenses of the journey. On retiring he left this money in his clothing in the stateroom, and during the night it was stolen, without any negligence on his part. *Held*, that the defendant was liable for the loss, without any proof of negligence on its part. *Adams v. New Jersey Steamboat Co.*, 45 N. E. Rep. 369 (N. Y.).

The decision is rested on the ground that a steamboat is, in effect, a floating inn, and that therefore the common law rule making innkeepers insurers of the money and

personal effects of their guests should be applied. It is submitted, however, that the case cannot be supported on principle or authority. Innkeepers were originally held to a strict liability, because, among other reasons, the inn was sought chiefly for protection. This argument in favor of an extensive responsibility does not exist in the case of steamboats and sleeping cars, their chief service being, not protection, but transportation; and it is quite possible that, were the question raised for the first time at the present day, the rigor of the rule with regard to innkeepers would be somewhat relaxed. In *Clark v. Burns*, 118 Mass. 279, where the plaintiff was a passenger on the defendants' steamer, and where his watch, placed in his clothing, was stolen from the stateroom at night, without negligence on the part of the defendants, it was held that the defendants were not liable as innkeepers; nor as carriers, inasmuch as the watch was not intrusted to their custody and control. See *Am. Steamship Co. v. Bryan*, 83 Pa. St. 446. But see also *Pullman Co. v. Lowe*, 28 Neb. 239, where a sleeping car company was held liable as an innkeeper. On the question as to whether the defendant, in the principal case, should have been held liable as a carrier, see *Angell on Carriers*, §§ 103, 115; *Redfield on Carriers*, §§ 77-87; *Kent's Com.*, *601, n.(c); *Story on Bailments*, § 595; *Browne on Carriers*, pp. 62-74.

CONSTITUTIONAL LAW—ENACTMENT OF STATUTES—IMPEACHMENT BY JOURNAL.—A State Constitution provided that no law to impose a tax should be passed, unless the yeas and nays were entered on the journals. The act in question was voted on by both branches of the legislature, attested by the presiding officers, duly enrolled, and printed among the State statutes. *Held*, that the omission from the journals of the yeas and nays invalidated the law. *Union Bank of Richmond v. Commissioners of Town of Oxford*, 25 S. E. Rep. 966 (N. C.).

How far, in general, courts will go into outside evidence, to prove invalid a statute which is properly enrolled and published, is not wholly settled. But they will clearly not look behind the journals of the two houses. So facts tending to show corrupt motives on the part of the legislature in passing a law will not be considered. A point of much difficulty is where the enrolled act and the journals do not agree as to the contents of a given bill. On the question which of the two records shall then control, the cases are conflicting. The English rule is to disregard the journals. And perhaps this can be said to be the tendency of recent decisions in America. This view has the argument of convenience in its favor. A full collection of authorities by States in *Field v. Clark*, 143 U. S. 649, 661, shows that upon this point the jurisdictions in this country are about evenly divided.

A somewhat different problem is presented when the Constitution expressly provides that certain formalities be observed, as, for example, that the yeas and nays appear on the journals. Under such a constitutional requirement the journals are usually examined, and if there is an absence of the yeas and nays from the record it defeats the statute. *Cooley, Const. Lim.*, 6th ed., 168. There are, however, some cases which hold that even then the enrolled act cannot be impeached by the journals. *Lafferty v. Huffman*, 35 S. W. Rep. 123 (Ky.). The court's assumption that the authorities are all on its side is hardly warranted.

CONSTITUTIONAL LAW—INTERSTATE COMMERCE.—*Held*, that a State statute requiring all passenger trains passing through a country to stop at the county seat is unconstitutional as a regulation of interstate commerce. *Illinois Cent. R. Co. v. State of Illinois*, 16 Sup. Ct. Rep. 1096.

Held, that a State law prohibiting the running of freight trains on Sunday is not invalid, as interfering with interstate commerce, though it prevents trains from passing through the State on that day from and to adjacent States. *Fuller, C. J.*, and *White, J.*, dissenting. *Hennington v. State of Georgia*, 16 Sup. Ct. Rep. 1086. See NOTES.

CONSTITUTIONAL LAW—SUBCONTRACTOR'S LIEN ACT.—*Held*, a statute giving to subcontractors and to those furnishing materials to the principal contractor a lien on the building contracted to be built, is unconstitutional, such statute being in conflict with Section 1 of the Bill of Rights, which declares that all men have certain inalienable rights, among which are those of enjoying liberty. *Palmer v. Tingle*, 45 N. E. Rep. 313 (Ohio).

The opinion in the principal case cannot be deemed conclusive. The court, on no very satisfactory authority, assumes the phrase "enjoying liberty" in the Bill of Rights to guarantee the freedom of contract subject only to such restraints as are necessary for the common welfare. The decision rests on this assumption,—an assumption which is soundly combated in an article by C. E. Shattuck, 4 HARVARD LAW REVIEW, 365. The decisions in different jurisdictions as to the constitutionality of statutes substantially similar to that involved in the principal case are in conflict.

CONSTITUTIONAL LAW—TAXATION FOR LOCAL IMPROVEMENTS—IRRIGATION DISTRICTS.—A statute authorized the formation of irrigation districts in California upon the application of fifty or a majority of the landowners in a district susceptible of one mode of irrigation from a common source. The cost was to be met by an *ad valorem* assessment on all the lands which could derive any benefit from the work. *Held*, the statute is not unconstitutional. Fuller, C. J., and Field, J., dissenting. *Irrigation Dist. v. Bradley*, 17 Sup. Ct. Rep. 56.

It is worthy of remark that the court nowhere in the decision speak of the police power. The ground taken is that in view of the condition of the country in the "arid belt," the use for which the water is to be procured is a public one, and the assessment therefore justified on the general principles of taxation. How far the purpose served is a public one is of course a matter of fact depending on the surrounding circumstances. And it is a delicate question whether the improvement is sufficiently public in its nature to justify the imposition of the tax upon one who does not care to avail himself of its benefits. The question seems to be no different from that involved in cases where a district is drained at the expense of the landowners, *Wurts v. Hoagland*, 114 U. S. 606, except that in the principal case the absence of any possible menace to the public health, and the fact that it is possible to perfect the work without giving any of its advantages to an owner who does not care to avail himself of them, serve to bring out the grounds of the decision more sharply.

An incidental objection urged by the appellee was, that, as the assessment was *ad valorem*, it might not be in proportion to the benefits conferred, but it was held that the apportionment of the tax was a matter of detail within the discretion of the legislature, which would not be disturbed unless manifestly unjust.

CONTRACTS—EXEMPTION FOR NEGLIGENCE UNDER FOREIGN LAW.—A bill of lading contained exemptions of damage from stowage and negligence, and provided that the contract should be governed by the law of the flag (English). The contract was not made, nor was any part of it intended to be performed, within British jurisdiction. *Held*, that such exemptions not being allowed by our law, the provisions of the bill of lading were void, notwithstanding such provisions would be valid by British law. *Brotony Worsted Mills v. Knott*, 76 Fed. Rep. 582.

The decision is eminently sound. As it is not permitted by the laws of their country to exempt for negligence, no contract made on such a basis can be valid. It may be objected that it was the expressed intention of the parties to be governed by the law of England. It is true that, where the place of making and the place of performance are different, many courts hold that the intention of the parties as to what law should govern, is of paramount importance. This, though a wide spread, is thought to be an incorrect doctrine. *Akers v. Demoud*, 103 Mass. 323; 10 HARVARD LAW REVIEW, 170. And in any event, no court would be likely to go so far as to say that where the making and performance of a contract are within the same jurisdiction, the parties may elect to be governed by the law of a different jurisdiction.

CONTRACTS—WILFUL BREACH—DAMAGES.—*Held*, that a contractor, though wilfully abandoning and refusing to complete a building contract, may recover on a *quantum meruit* a sum not exceeding the contract price, less the cost of completing the work and less any damage and added expense incurred by the defendant by reason of the breach of contract by plaintiff. *Sheldon v. Leahy*, 69 N. W. Rep. 76 (Mich.).

This decision, in accord with *Britton v. Turner*, 6 N. H. 481, is sound in principle, and notes a tendency to follow that leading case in other jurisdictions. Under the rule as laid down there can be no possibility of loss to the defendant, and there is no valid reason why he should be unjustly enriched. But the great weight of authority is *contra* to the principal case. See Keener on Quasi Contracts, 215, and cases cited, and on grounds of public policy these latter cases are supported, as it is easily seen that if a recovery is allowed on a *quantum meruit* there will be an increasing tendency to break existing contracts.

CORPORATIONS—INVALID APPOINTMENT—RECOVERY OF SALARY.—A decision that one of the members of a municipal board had not been properly elected invalidated the appointments of that board. *Held*, that an attorney whom they had appointed could not recover for services already performed. *Mayor of Jersey City v. Erwin*, 35 Atl. Rep. 948 (N. J.).

It is generally stated in the text-books that a *de facto* officer of a municipal corporation cannot recover for his services. A distinction is thus made between municipal and private corporations. In the cases cited to support this proposition, it appears that there were *de jure* officers also claiming the appointment; consequently those usurping the position were rightly not allowed to recover what belonged to others. Here this is not the case, and no grounds of public policy seem to demand an exceptional doctrine.

CORPORATIONS — LIABILITY OF STOCKHOLDERS — TRANSFER OF STOCK. — *Held*, that one who has given notice to a corporation to transfer his stock on their books will not be liable as a stockholder on an assessment. *Cox v. Elmendorf*, 37 S. W. Rep. 387 (Penn.).

In bringing his bill, the receiver enforces the rights of the corporation against its stockholders. Defendant is legally a stockholder, but only because of the negligence of the corporation, and therefore, unless there is something peculiar about the case, it would seem as if equity would require the corporation to make the transfer which would release the defendant. Mr. Taylor, in his work on corporations, considers that the case is exceptional. He says that the receiver represents the creditors as well as the corporation; that the stockholder in putting his name on the books alleges that he will be liable to pay up assessments; that on this statement the creditor has a right to rely. But, as a matter of fact, the stockholder does not make such a representation. He simply says that he or his transferee will be liable. Every creditor knows that the corporation which pays the debt will probably not be composed of the same persons as the corporation which borrowed, and so cannot complain because defendant is released and his assignee substituted.

CORPORATIONS — RAILROADS — EXECUTION. — *Held*, that the portion of the right of way of a railroad passing through a county may be sold on execution for the payment of taxes upon it. *Purefoy v. Lamar*, 20 So. Rep. 975 (Ala.).

Though the right of a railroad in its road-way is generally an easement only, it has been held none the less alienable. As an easement in gross, it is sometimes considered as granted to the public, whom any railroad company may represent. *Pierce on Railroads*, 528, 529; 2 Wood on Railroads, 901. But a more satisfactory view is that it is an easement appurtenant to the whole property of the railroad company, and so alienable with that. *Junction Ry. v. Ruggles*, 7 Ohio St. 1. If the latter position is correct, however, it is difficult to support the principal case; for only a portion of the easement and tracks were declared transferred, without any property to which they might be regarded as annexed. Nor is the decision supported by the cited authority. In *Tenn. Ry. v. E. Ala. Ry.*, 75 Ala. 516, it is decided that a railway company may bring ejectment for their easement; while *Hooper v. Ry.*, 78 Ala. 213, decides that railroads may be ejected from land. There is, moreover, a common objection that no railway corporation may be deprived of the property by which it is to serve the public. *Plymouth Ry. v. Colwell*, 39 Pa. St. 337. *State v. Rives*, 5 Ired. 297, *contra*.

CORPORATIONS — ULTRA VIRES LEASE — RECOVERY OF RENT. — Where a corporation made an *ultra vires* lease, *held* that the amount of the rent that accrued while the lessee was in actual possession may be recovered from a surety on a bond conditioned for performance of the covenants of the lease. *Bath Gaslight Co. v. Claffy*, 45 N. E. Rep. 390 (N. Y.). See NOTES.

CRIMINAL LAW — HOMICIDE — SELF-DEFENCE — DUTY TO RETREAT. — *Held*, a person who is unlawfully attacked by another may stand his ground, and use such force as at the time reasonably appears to him to be necessary to protect himself. *State v. Hatch*, 46 Pac. Rep. 708 (Kan.).

This is true up to a certain point. Doubtless a person who is unlawfully assaulted may stand his ground and meet force with force, so long as there is no question of extreme violence or taking life. But where there is a state of facts such that the person attacked has the alternative of retreating or of killing his assailant, there seems no doubt that he ought to retreat. He should take his assailant's life only when, in his opinion, as a reasonable man, that is the only means of saving his own. 9 HARVARD LAW REVIEW, 214; *State v. Donnelly*, 69 Iowa, 705. The Kansas court, on the contrary, expressly repudiates this view, and lays down the dangerous principle that one unlawfully attacked need never retreat, but may meet force with force to the last extreme.

EQUITY — INJUNCTION — PUBLIC NUISANCE. — The State authorities applied for an injunction against the keeper of a common gambling-house. *Held*, that, though a common gambling-house is a public nuisance, the court would not issue an injunction unless irreparable injury is threatened to property or civil rights, which is not shown here. *State v. Patterson*, 37 S. W. Rep. 478 (Tex.). See NOTES.

EQUITY — JUDGMENT CREDITOR'S BILL. — *Held*, that equity will not entertain jurisdiction of a bill by a judgment creditor, seeking to subject a widow's right of dower, before assignment to her, to the payment of the judgment debt. *Harper v. Clayton*, 35 Atl. Rep. 1083 (Md.).

Though there is not much authority on this point, the weight of opinion seems to be that equity will aid judgment creditors to reach the right of dower of the widow

before it has been assigned. 3 Pomeroy's Eq. Juris. § 1383. Her right before assignment of dower being a chose in action, and the better view being that, although a chose in action belonging to the debtor cannot be seized upon common law execution, yet it can be reached through the aid of equity (*Hadden v. Spader*, 20 Johns. 554), the decision in *Davison v. Whittlesey*, 1 MacArthur, 163, *contra* to the principal case, seems a more correct exposition of the law. As stated in the last mentioned case, it is unjust for the widow to defeat the rights of her creditors by neglecting to ask for a formal assignment; this forms another good ground for the interposition of equity.

EQUITY—SUBROGATION.—Petitioner, a tax collector, accepted a check in payment of taxes on the land. The check was never paid, the drawer having become insolvent. A statute required the payment of taxes in cash. Petitioner prayed that he might be subrogated to the lien of the State for the taxes thus paid. *Held*, petitioner's case did not entitle him to the relief asked. *Mercantile Trust Co. v. Hart*, 76 Fed. Rep. 673.

A third person who had advanced to the tax payer money with which to pay the taxes on the land could not ask subrogation. On the facts of the principal case the tax collector is substantially in the position of such third person; his act amounted to cashing the tax-payer's check on his—the collector's—individual account. The interesting question as to whether one can under any circumstances claim subrogation to the State's lien for taxes, though touched on, is not discussed.

EVIDENCE—DECEASED WITNESS—TESTIMONY GIVEN AT FORMER TRIAL.—A was accused of murder. On the preliminary trial B was a witness, and testified against him. A was present and had the opportunity of cross-examination. B afterwards died, and at a later trial the evidence was offered which B had given at the former hearing. *Held*, it was inadmissible. *Cline v. State*, 36 S. W. Rep. 1099; 37 S. W. Rep. 722 (Tex.).

The majority opinion does not seem sound. It is based on too strict a construction of that constitutional provision, which is found in almost every State, to the effect that in criminal prosecutions the prisoner shall be confronted with the witnesses against him. The court reads this language of the Constitution with absolute literalness, failing to appreciate the fact that it should be interpreted in the light of the history of the law. The reasoning advanced, resting as it does on the literal words of the Constitution, would apply equally well to dying declarations, although one would hardly think seriously of contending that these should be excluded. Formerly a few States did refuse to receive the reported testimony of a witness living at a former trial, and since deceased. But the cases are now practically unanimous against this view. Best on Ev. Am. ed., 472, 473; Jones on Ev. § 345. One of the latest adjudications on the subject is by the United States Supreme Court in *Mattox v. United States*, 156 U. S. 237, 240, a decision which is directly *contra* to the result reached in the principal case.

INSURANCE—INTERPRETATION OF AN AVOIDING CLAUSE—VALIDITY OF A PRIOR POLICY.—The defendant company issued a policy to the plaintiff, containing the provision that if a subsequent policy should be taken on the same premises the policy should be void. The plaintiff took another policy containing the provision that it should be void if there existed any other policy. *Held*, that the taking of the second did not render the prior one void, but that the plaintiff could recover. *Sweeting v. Mutual Fire Ins. Co.*, 34 Atl. Rep. 826 (Md.).

As this was the first time the question had arisen in Maryland, the court were not bound by any decision in that State, but were at liberty to follow the opinion that, as the second was unenforceable as soon as issued, the condition in the first was not violated. *Thomas v. Ins. Co.*, 119 Mass. 121; *Ins. Co. v. Holt*, 35 Ohio St. 189; *Stacey v. Ins. Co.*, 2 Watts & S. 506; *Lindley v. Ins. Co.*, 65 Me. 368; *Gee v. Ins. Co.*, 55 N. H. 65; *Ins. Co. v. Nichol*, 35 N. J. Eq. 291; *Ins. Co. v. Slaughter*, 20 Ind. 520. The opposite result was reached in *Carpenter v. Ins. Co.*, 16 Pet. 495; *Allen v. Ins. Co.*, 30 La. Ann. 1386; *Somerfield v. Ins. Co.*, 8 Lea, 547; *Biglers v. Ins. Co.*, 22 N. Y. 402; *Tynke v. Ins. Co.*, 29 Minn. 347. These cases proceed on the theory that the second policy is not void at once, but that the provision in question only gives the insurer a defence in an action on the policy, and until that defence is taken the policy is not void, as its nullity does not appear upon its face. In order to answer this argument recourse must be taken to the intention of the parties and the provision viewed in that light. The obvious intention was to prevent the possibility of the insured over-insuring. This purpose is attained when he had only one policy on which he can recover. As the words of the provision will bear such an interpretation, it may well be said that the view taken in the principal case represents the better opinion, for in it justice and the real object of the provision prevail over a mere technicality. There is another or intermediate view taken in *Hubbard v. Ins. Co.*, 33 Iowa, 355, that the validity of the prior policy turns on

the question whether the subsequent one has in fact been avoided. This opinion is clearly insupportable, for it makes the validity of an agreement between two parties turn on the arbitrary acts of a third party, which were not provided for in the agreement. The opinion in the principal case is well reasoned.

INSURANCE — SUBROGATION. — A lessor agreed with a sub-tenant to lay out any money received from his (the lessor's) insurance on repairing, and the sub-tenant covenanted with his lessor to leave in repair. The sub-tenant then took out insurance with the plaintiff company in his own name, and on the destruction of the property recovered the amount of insurance from the plaintiff. *Held*, that the plaintiff might recover the amount which it had paid, the defendant having, for his own reason, released his lessor from the covenant to make good such damage, and thereby having deprived the plaintiff of its right of subrogation. *West of England Ins. Co. v. Isaacs*, [1896] 2 Q. B. 377.

A policy of fire insurance is a contract of indemnity, and the insurer on making good the loss is entitled to stand in the shoes of the insured. *Darrell v. Tibbets*, 5 Q. B. D. 560. Moreover the insurer is entitled to any rights which have accrued to the assured, whether fulfilled or unfulfilled. *Castellain v. Preston*, 11 Q. B. D. 380. The release of the lessor, since there was no question of fraud on his part, was a valid one; but as the defendant had no right to release him, *Monmouth Ins. Co. v. Hutchinson*, 21 N. J. Eq. 107, it seems only reasonable that the assured should be liable to the insurer for the benefit, to which they had a right to be subrogated, and which was lost to the insurer by the act of the assured.

PERSONS — SALE OF OPIUM TO WIFE. — *Held*, that a husband may recover damages from a druggist who, against the husband's orders, has sold laudanum to his wife, in consequence of which she has become a confirmed subject of the opium habit, resulting in the loss of her services and companionship. 25 S. E. Rep. 972 (N. C.).

In North Carolina a husband is entitled to his wife's earnings, so that the plaintiff has suffered a more tangible injury than mere loss of companionship. The court takes the ground that the defendant is liable because he has wilfully assisted the wife in doing an act which has deprived her husband of her services and companionship. To be sure it was in the course of business and with the purpose of gain, but that hardly justifies the voluntary infringement of the husband's rights. *Hoard v. Peck*, 56 Barb. 202, is in accord with the principal case. It would be interesting to see whether the same view would be taken to-day in jurisdictions where by statute a married woman is practically independent. In such States it seems that the same rule should apply to actions by the wife for loss of her husband's companionship under like circumstances.

PROPERTY — ADVERSE POSSESSION — INFANCY OF TENANT IN COMMON. — In an action for the recovery of land, by tenants in common, *held* that the minority of one tenant in common will protect the entire property held in common from the operation of the Statute of Limitations in favor of an adverse claimant in possession. *Garret v. Weinberg*, 26 S. E. Rep. 3 (S. C.).

There seems to be no reason why the minority of one tenant in common should prevent the Statute from running against the adult tenants. The defendant has had adverse possession for the statutory period. But the infant tenants, having been under a disability during that time, are protected. The adults, however, have labored under no disability, and against their claims the defendant should be allowed to plead the Statute of Limitations. The contrary doctrine, as held in South Carolina is the result of early decisions in that State, adopted with reluctance in later cases. *Hill v. Saunders*, 4 Rich. 521.

PROPERTY — CONSTRUCTION OF WILL — ELECTION. — In an action to which plaintiff was not a party, it was decided that on the death of one of testator's married daughters without children her share should go to her sisters. Plaintiff through his wife received a share under such division. On her death, he now claims that the will should be construed to give her property to her heirs generally, including him. *Held*, that, having acquiesced in the above distribution of a similar interest, he could not now contend for a contrary interpretation of the will. *In re Lart*, [1896] 2 Ch. 788.

The point decided is a novel one. The only cases cited by counsel, holding that where one stands by while a will in which he is interested is being interpreted he is bound by the result, were distinguished by the court on the ground that the exact claim now presented had not been decided in the previous judgment. The gift to the first daughter, though similar, was not identical with the one in question. The result reached, however, is clearly correct, resting on the broad and ancient doctrine that a man taking a benefit under an instrument may not maintain inconsistent positions. See 4 Com. Dig. 76. It has frequently been held that one who accepts a benefit under

a will agrees to the whole of it. It would seem by analogy, that one knowing all the facts, who accepts a gift under one construction, agrees to have that construction applied to the whole will.

PROPERTY — COVENANT OF WARRANTY — MEASURE OF DAMAGES. — *Held*, that an evicted covenantor may recover of a remote warrantor of the title the sum received by such warrantor from his immediate grantee as the price of the land, though such covenantor himself paid to his immediate grantor a less sum. *Hollingsworth v. Mexia* 37 S. W. Rep. 454 (Tex.).

In an action on a warranty of title to land by the immediate covenantor, nearly all the States outside New England fix the damages for total eviction at the amount of the purchase money, on the ground that, as this is simply a substitute for the ancient real warranty, the thing promised is to restore the value of the land at the time of the covenant. *Pitcher v. Livingston*, 4 Johns. 1; *Sutton v. Page*, 4 Tex. 142. If this ground is correct, it is difficult to see how the liability of the covenantor can be increased or diminished by any subsequent dealings with the land. Several courts, however, have held that the liability of the covenantor is limited to the price paid by the plaintiff, if that is less than the covenantor received. *Crisfield v. Storr*, 36 Ind. 129; *Mette v. Dow*, 9 Lea. 93; *Williams v. Beeman*, 2 Dev. 483. The rule of the principal case is followed in *Brooks v. Black*, 68 Miss. 161, *Lawrence v. Robertson* 10 S. C. 8, and *Mischke v. Baughn*, 52 Iowa, 528.

PROPERTY — JUDGMENTS — COLLATERAL ATTACK. — *Held*, a sale of land by an administrator, confirmed by the Orphan's Court, made on its order on the administrator's petition, alleging death of the intestate seized of the land, the existence of the debt, the insufficiency of personal estate, and the necessity of selling the land to pay the debt may be attacked collaterally by the heirs, for want of jurisdiction of the Orphan's Court, because the debt was barred by the Statute of Limitations, and the land was by provision of statute relieved from the lien of the decedent's debt, though the want of jurisdiction does not appear upon the record. *Rees v. Wildman*, 35 Atl. Rep. 1047 (Pa.).

It is a well established rule of law, that, if a court has no jurisdiction, its judgment may be collaterally attacked. The reason for this is obvious. But the principal case is one in point, and resembles closely the cases involving the administrator's sale of a living person's estate, where it has been held that the sale is absolutely void. *Fochum-son v. Suffolk Savings Bank*, 3 Allen, 87; *Scott v. McNeal*, 14 Sup. Ct. Rep. 1108.

PROPERTY — LIABILITY FOR RENT — DESTRUCTION OF PREMISES — EVICTION. — The plaintiff leased to defendant a "landing" on a river. By an extraordinary flood the bank was swept away, so that no practicable landing was left. Works were also built in the river by the lessor's authority, which prevented access to the shore. *Held*, that defendant's liability for rent was extinguished; first, because the property leased was wholly destroyed; and secondly, because he might be considered as evicted by the lessor's acts. *Waite v. O'Neil*, 76 Fed. Rep. 408. See NOTES.

PROPERTY — LICENSE TO CUT TIMBER — REPLEVIN. — The owner of some timber land gave a license to enter on the land and cut the timber for the licensee's own use; The plaintiff purchased this license for valuable consideration. The owner then sold the land to the defendant, reserving to himself and his assigns the timber and the right to enter and cut it. The defendant cut and carried off a part of the timber and on demand by the plaintiff refused to give it up. *Held*, in an action of replevin, that the plaintiff could recover. Carroday, C. J. dissenting. *Keystone Lumber Co. v. Kolman*, 69 N. W. Rep. 165 (Wis.).

The case presents a new and interesting question, and the court consequently discuss it from an *a priori* standpoint. The opinion of the majority is at least ingenious, based on the ground that the defendant is the agent of the plaintiff, and that therefore the act of severing is done by the plaintiff's agent so that he thereby acquires title. The opinion of the dissenting judge shows closer legal reasoning. His contention is that the defendant's act was a tort against the owner of the timber, since the title remained in him until the severance by the licensee, and that the plaintiff had no right to waive this tort as it was not against him, and adopt the defendant's wrongful act. That the defendant would be liable also to the licensor, the owner, seems clear, because the tort was against him in a destruction of his property. Whether the plaintiff might have an action on the case against the licensor or against the defendant for making his license less valuable is another matter. It is submitted that the opinion of the dissenting judge represents the better view.

PROPERTY — RENT CHARGE. — *Held*, that an action of debt will not lie against a tenant for years for the non-payment of a rent charge issuing out of the land of which he is in possession. *In re Herbage Rents*, [1896] 2 Ch. 811.

Although this case is not likely to come up in this country, where rent charges are almost unknown, it is of great importance in England, and it is curious that the exact point has never before been adjudicated upon. The ancient action at law for the non-payment of a rent charge was by assize of novel disseisin (Lumley on Annuities, 388), and when real actions were abolished it was held that debt would lie for the rent. *Thomas v. Sylvester*, L. R. 8 Q. B. 368. But the parties liable remained as before, the terre-tenants, or those only who had an estate of freehold in the premises. The grantee of the rent, however, could distrain the goods of the tenant for years, or even of a stranger, on the land. Gilbert on Distress, 35.

PROPERTY — WILLS — CONDITIONS IN RESTRAINT OF MARRIAGE. — *Held*, that the rule that conditions in restraint of marriage are void does not apply to second marriages. *Herd v. Catron*, 37 S. W. Rep. 551 (Tenn.). See NOTES.

PROPERTY — WILLS — EXECUTORY DEVISE AFTER DEATH "WITHOUT ISSUE." — A testator devised property to his son and his heirs, but provided that in case the son should die "without issue of his body, then the same to go to the heirs of N." In other parts of the will, the testator had provided for various children and grandchildren. *Held*, that the other provisions of the will and the use of the word "then" show that the testator meant by the words "without issue of his body," a definite failure of issue during his son's life. Such being the case, the devise to the heirs of N. is valid as an executory devise. *Strain v. Sweeney et al.*, 45 N. E. Rep. 201 (Ill.).

The above case illustrates the tendency of the American courts not to be bound by fixed rules of construction, and to follow a testator's supposed intention, even though the evidence of such intention is slight and of a conjectural character. See Jarman on Wills, 6th Am. ed., §1320, n. 1.

PROPERTY — WILLS — "SURVIVOR" CONSTRUED AS "OTHER." — A testator devised property to his wife for life, and on her death to his eight children "to them and their heirs and assigns forever, and in case of the death of any one of them without issue living at the time of his or her death, I do give and devise his or her share to the survivor or survivors." *Held*, the word "survivor" must be taken to have been used in its natural and ordinary sense, and not in the sense of the word "other." *Anderson v. Brown*, 35 Atl. Rep. 937 (Md.).

There are few American authorities on this point of construction, and those few treat the matter very summarily. The question, however, has arisen often in England, and the opinion of the court in the present case is based on the result of the English decisions. In *Twist v. Herbert*, 28 L. T. (N. S.) 489, Lord Selborne says, "The words 'survivor' or 'survivors' are to be taken in their natural and primary sense, except when there is some reason which justly leads to another conclusion." See also *Maden v. Taylor*, 45 L. J. Ch. 569. A common case where "survivor" would generally be construed as "other" occurs when property is given to A and B in fee as tenants in common, with an executory devise to the survivor on the death of either without issue, and a further executory devise over on the death of both without issue. In such a case, if A should die first leaving issue, and then B should die without issue, the property would go to A's issue, although they are not technically included in the word "survivor"; otherwise there would be an intestacy, as the second executory devise was contingent on the death of both A and B without issue. See *Smith v. Osborne*, 6 H. L. 374.

PUBLIC OFFICER — LIABILITY FOR PUBLIC MONEYS. — The defendant, a town supervisor, deposited with a firm of bankers, to his credit as supervisor, public moneys in his hands. The banking firm failed, and the money was lost. The defendant acted in good faith and without negligence. Action was brought by the county treasurer on the defendant's official bond. *Held*, on grounds of public policy, that the defendant, being under the duty to account as a debtor for the public funds in his custody, was liable. *Tillinghast v. Merrill*, 45 N. E. Rep. 375 (N. Y.), Gray, J. dissenting.

Strangely enough this question is now passed upon for the first time by the New York Court of Appeals. The decision seems to reach a just result, and to be in accord with cases in other jurisdictions, which hold that a public officer, required to account for public moneys coming into his hands, is liable, even though the money be lost by theft, bank failure, or the like, without his fault, unless relieved from this responsibility by statute. See a recent case, *Fairchild v. Hedges*, 44 Pac. Rep. 125; *U. S. v. Prescott*, 3 How. 578; *Inhabitants of Hancock v. Hazard*, 12 Cush. 112; *State v. Harper*, 6 Oh. St. 608; 1 Dillon on Munic. Corp. § 237, n. 4; decisions cited in the principal case. But see also the dissenting opinion of Hoyt, C. J., in *Fairchild v. Hedges*, *supra*.

The court, in the principal case, by stating the defendant's liability as that of a debtor, probably did not mean to imply that he was not a trustee. That a public officer, much like a *del credere* factor, is a trustee, although held to the strict liability

of a common law debtor, is indicated by the fact that he may be indicted as an embezzler. Furthermore, it would seem clear that, if the officer became bankrupt, and the public funds were traceable, the organization to which he was responsible would have a specific claim on the funds and would not come in as a general creditor. The court, in the principal case, leaves open the question as to the legal result were the officer prevented from responding by the act of God or the public enemy, intimating, however, that in this case he would be exonerated. There is thus suggested a very strong analogy between a public officer and a common carrier.

SURETYSHIP—RIGHT TO RESERVE FUND.—A building agreement between the United States and a contractor provided for the retention of ten per cent of the contract price until the completion of the work. After beginning the work, the contractor agreed to deliver this reserve to the plaintiff bank, because of advances then made by it for the purpose of going on with the work. The contractor defaulted, and his surety completed the contract. *Held*, that the lien of the bank was inferior to the rights of the surety in the reserve. *Bank v. U. S.*, 17 Sup. Ct. Rep. 142.

The case presents an interesting application of the doctrine that the reserve is as much for the indemnity of the surety as of the party to whom the guaranty is given; *Bragg v. Shain*, 49 Cal. 131, and this equity of the surety arose at the time of his entering into the guaranty. The assignee of the contractor could acquire only such rights as the contractor had, and these were subject to the rights of the United States and the surety in the reserve. To hold the assignee entitled to the fund would be to deprive the surety of the indemnity of this reserve, and so alter the terms of his guaranty, thereby releasing him. *Calvert v. Dock Co.*, 2 Keen, 638.

TORTS—CONTRIBUTORY NEGLIGENCE IN MITIGATION OF DAMAGES.—*Held*, that where the defendant's negligence was the direct or proximate cause of the plaintiff's injury, contributory negligence on the part of the plaintiff will not prevent a recovery, but will be considered in mitigation of damages. *Southern Ry. Co. v. Pugh*, 37 S. W. Rep. 555 (Tenn.).

This case apparently represents the established rule of the Tennessee courts. See *Nashville Ry. Co. v. Smith*, 6 Heisk. 174. The doctrine seems to be essentially the same as that of "comparative negligence" and of similar rules adopted in Georgia and other American jurisdictions. See *Beach on Contributory Negligence*, 2d ed., §§ 72-99; *Cooley on Torts*, 2d ed., 813-816; *Rev. Stats. of Florida* (1892), 764, 1008. The Illinois courts have, however, in recent divisions, discarded their anomalous doctrine of comparative negligence. 8 *HARVARD LAW REVIEW*, 279, 356; 2 *Jaggard on Torts*, 799. It seems unfortunate that the courts in Tennessee do not also see their way clear to the adoption of a better rule, such as that of the prevailing common law rule represented by *Neal v. Gillett*, 23 Conn. 437. Unquestionably there is something to be said in favor of the rule in the principal case (*Beach on Contributory Negligence*, § 95), but it would seem that practical considerations, such as the impossibility oftentimes of equitably apportioning the damages in common law courts, should lead to its abandonment.

TORTS—MASTER AND SERVANT—RELIEF ASSOCIATION.—In an action by a servant against a railway company to recover damages for an injury through negligence, *held* that a plea that the servant accepted benefits as a member of a relief association, organized by the company, under the agreement that he thereby relinquished his right of action, does not constitute a good defence, since it does not sufficiently appear that his contract was not voidable for want of consideration. *C. & B. & O. Railway Co. v. Miller*, 76 Fed. Rep. 439.

The court go on the assumption that the stipulation in question is not opposed to sound public policy; and this would seem to be correct, inasmuch as the employee retains, until after he sustains the injury, the right to elect whether he will sue the company for negligence or accept benefits from the association. *Leas v. Penn Co.*, 37 Fed. Rep. 423; *Johnson v. Phil. & Read. R. R.*, 163 Pa. 127. But in cases of this character, where the contract invoked as a defence lies close to the line of public policy, it would seem doubly necessary that a sufficient consideration to support such a contract should appear with great clearness. *Railroad Co. v. McGraw*, 45 Pac. Rep. 383.

TORTS—PROXIMATE CAUSE—INJURIES FROM FRIGHT.—Defendant, by negligent driving, frightened plaintiff so that she afterward suffered a miscarriage and a long illness. *Held*, that no recovery may be had for injuries resulting from fright, caused by negligence of another, where no immediate personal injury is received, and that the negligence was not the proximate cause of the miscarriage. *Mitchell v. Rochester Ry. Co.*, 45 N. E. Rep. 354 (N. Y.).

This reverses in a short opinion a long and carefully reasoned decision in the Circuit Court, 25 N. Y. Supp. 744, affirmed by the Supreme Court, 28 N. Y. Supp. 1136

The Court of Appeals is influenced largely by fear of opening the way for speculative claims, and admits no distinction in this respect between cases where the suffering is purely mental and those where the actual physical damage follows. The reasoning of the lower court, 25 N. Y. Supp. 744, is much more satisfactory, though of course the authority of *Victorian Ry. Commissioners v. Coultas*, 13 App. Cas. 222 (Privy Council), is very strong in support of the final decision. The case is discussed at length in a note, 7 HARVARD LAW REVIEW, 304. See also 10 HARVARD LAW REVIEW, 239.

REVIEWS.

GENERAL DIGEST. 1896. Vol. I., New Series. (Sept. 1, 1895, to July 1, 1896.) Rochester: The Lawyers' Co-operative Publishing Co. 1896. pp. viii, 1709.

GENERAL DIGEST. Quarterly Advance Sheets. (Supplement to Vol. I., New Series.) (No. 1, to October, 1896.) Rochester: The Lawyers' Co-operative Publishing Co. 1896. pp. 504.

A new scheme has been adopted for the publication of the General Digest. It is proposed to make the permanent volume semi-annual, and to confine it to cases that have already appeared in the official reports and those never to be officially reported. Digests of cases before they are incorporated in the official reports will be published in Quarterly Advance Sheets. These are convenient paper-bound volumes containing from four thousand to eight thousand cases each, and excellent as to classification. The permanent volume for 1896 is well arranged and the cases are succinctly digested. Judged by these its first specimens, the new plan would seem to be an improvement on older methods.

R. L. R.

FEDERAL JURISDICTION AND PROCEDURE. By William A. Maury, LL. D., Professor in the Law School of Columbian University. Washington: W. H. Lowdermilk & Co. 1896. pp. 54.

While designed for the use of the student, this little compilation will unquestionably prove helpful to the profession. Its chief value lies in placing before the reader, in a convenient way, the recent Acts of Congress providing, among other things, for the establishment of the United States Circuit Courts of Appeals, and for the determination of their jurisdiction. To these the compiler has wisely added the several provisions of the Constitution bearing on the Judicial Power, certain provisions of the Revised Statutes relating to that power and regulating the appellate power of the Supreme Court, Rules of the Supreme Court, and an excellent selection of forms. The limitations of this work, however, incident to its size and general scope, are apparent; and for a complete presentation of the subject the student and the lawyer alike will be forced to turn to larger works, and to the Revised Statutes and Statutes at Large of the United States. While the absence of an index is not so much to be regretted, it would seem that, considering the nature of the volume, certain of the compiler's notes, and especially those containing citations to decided cases, might better have been placed at the foot of the page, instead of being introduced in the text between the sections of statutes.

H. D. H.

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NO. 7.

THE PLEDGE-IDEA: A STUDY IN COMPARATIVE LEGAL IDEAS. II.

IN a previous article,¹ taking up the pledge-idea in Germanic and Scandinavian law, we first noticed its development from the forfeit-idea to that of collateral security; and then proceeded to examine the relation of three subsidiary types, — the hypothec (or pledge without creditor's possession), the sale-for-repurchase, and the *viſgaga*. The second of these we now take up.

III. Sale for Repurchase.

Since the *wed*, in its original form, was the transfer with a right, but no duty, on the transferor's part, to redeem, it might seem a not inaccurate description to call it a sale with right to repurchase (*Verkauf auf Wiederkauf*, *vente à réméré*). At any rate, a transaction called by these names is constantly found where a pledge would apparently have served the same purpose; and its relation to the *wed* is one of the problems to be solved. The chief questions are: 1. How far, in form and in legal effect, was there a difference? 2. How far originally were the motives, or circumstances of use, the same or different? 3. What ultimate trace, if any, has been left on the pledge-transaction by the other?

1. *a.* So far as the form of the transactions was concerned, they appear to have been, to a great extent at least, interchangeable, and to have been used, at least frequently, without discrimination,

¹ 10 HARVARD LAW REVIEW, 321.

and with more or less mingling of terms. In a contemporary's words: —

"Is tamen usus loquendi est laicorum, qui inter nomen venditionis, ubi immobilia cum pacto retrovendendi venduntur et inter nomen pignorationis, non faciunt differentiam."¹

The summing up of Heusler seems incontrovertible: "The *satzung* is in its essential nature a conditional sale; . . . they are merely differing modalities, such as are often found in the law, without thereby marking any difference of institution."²

b. But this identity of essence, in that both transactions leave the transferor with a right, but no duty, to redeem, was not inconsistent with minor differences of legal effect, which might furnish a motive for choice between them. Were there such differences?

(1) Term of redemption. There was apparently no difference here. The *wed* with no fixed term might be redeemed indefinitely in the future, as we have already seen, except where a custom or law had come in time to establish a limit; and the same appears to be true of the right to repurchase.³ Apparently, however, the

¹ Zasius, writing in 1590, quoted Meibom, 7.

So also the constant use and modern perpetuation in pledge-terms of *redimo, redemptio*, shows how, even in the payment which released a pledge, the idea of "buying back" was originally a natural one (Meibom, 265; Heusler, II, 138). Again, the phrases of pledge and sale are frequently found coupled in a way that indicates the absence of any necessity for or habit of discrimination; thus, "*weddeschatte verkopen*," and "*wedderkope verpanden*" occur (Meibom, 266); a castle is sold for repurchase, and the document continues, "und sie wollen uns das Schloss, und was ihnen damit *versetzt* ist, *wieder zu kaufen* geben," etc. (Heusler, II, 138); so in Latin, "*Hec cartula vendicionis pignus est posita*" (Kohler, 357). So, too, in phrases purporting to enumerate the possible ways of creating pledge-incumbrances: "*Alle die gute die von uns verchumbert, versetzt, oder auf einen widerchauf verchauffet, sint*"; "*quae inventa fuerint impignorata vel sub spe redemptionis vendita*" (Meibom, 360). There was the same interchangeability in Scandinavian custom (Amira, I, 218 ff.; II, §§ 22, 69). In Iceland the development of the sale-form was marked. There were two varieties, with reference to time of redemption, — *seljd til stefun*, sale till term, and *seljd til mðla*, sale till resale, i. e. for an indefinite period. There was also a peculiar form in some laws, known as *forsolumala*, which the buyer had also the right to compel the seller to buy back, i. e. to treat the original advance as a debt; this was equivalent to the later form of the pledge, and was used in its stead.

² II, 137. This quality completes the demonstration, if anything is needed, that the primitive nature of the *wed* is that of a provisional discharge of the claim, leaving the debtor with no duty to pay or redeem.

³ Amira, II, § 69. In Scandinavia this perpetual redeemability was cut down by successive steps; 15 and 20 years were the periods prescribed by some laws, and sometimes the limit could be kept open by a public notification of the claim. A distinction also existed in favor of *stammgut*, or inherited land, which has an important bearing later. In Germany the authorities accessible do not mention the existence of such limits; but they can hardly be doubted.

indefinite term in the latter was in practice more frequent, — a circumstance whose bearing will be seen later.

(2) Validity of third persons' rights. A *res* in the transferee's hands was equally safe, as regards the transferor, whether given in *wed* or by sale for repurchase. There was no *auflassung* in either (see *infra*); and hence the seller's right, in the sale for repurchase, was not a mere personal one against the buyer, but involved a property right to redeem in the hands of a transferee from the buyer.¹ The later use of the *auflassung*, however, would seem to have destroyed this right in both alike.

(3) Accessory nature of the *wed*. As the accessory or collateral-security function of the *wed* developed, there would of course be a difference between that and a sale for repurchase, in that along with the former a debt would independently coexist. But this could not affect the choice for the creditor, for he then would and did simply take a separate instrument of debt along with the sale-document, so that if he chose he could pursue the debtor on that claim without availing himself of the *res*.

(4) Necessity of *auflassung* or *resignatio*. If the sale for repurchase involved an *auflassung*, this would furnish a decided motive for the creditor's choice. But it seems clear that originally the *auflassung* was wanting in the sale for repurchase, just as it was in the *wed*; the theory of the transaction, as well as the actual forms of the documents, show this.² Later, when the *auflassung* was resorted to in the *wed* in order to give the creditor absolute title without going into court, and thus to evade the duty of restoring the surplus (as already explained,) the same practice appears in the sale for repurchase.³ Just here came an opening for a

¹ Heusler, II, 139. Meibom, 359, is *contra*; but does not take notice of the lack of *auflassung*. The modern law, till the new Code, took a middle position: Motive zum bürgerl. Gesetzb., III, 451. Heusler seems to believe that the pledgee's sale to a third person would be wholly unlawful, without express permission, but that in the sale for repurchase the right to sell was usually given, subject to the original seller's right to buy back from the third person; so that the latter afforded a better expedient where the pledgee wished the means of speedy realization by resale (II, 140). But this seems reducible to a question of whether the permission to resell was given more frequently in the latter than in the former, and there seems to be no evidence that it was.

² Heusler, II, 138.

³ Ib. 139. Neumann, 191, has a typical form, from Cod. Dipl. Siles., IV, 298: "A. . . a J. et J. filiis N. . . ix. virgas agri . . . comparavit [bought] . . . , quas ad manus A. resignaverunt; graciose est adjectum quod si infra viii. annos restituere poterint quantitatem pecuniæ pretaxatam, . . . A. arbitrio et favore vendendi predictis fratribus stare debeat."

decided choice between the two forms; for, as we have seen, the later mediæval and early modern law set itself to nullify this evasion of the pledgee's duty by requiring him to come to court for forcible closure of the pledge, and to sell and to hand over the surplus, in spite of such a forfeiture-clause; and by calling the transaction a sale he might escape this supervision. This choice, however, was essentially a result of the later law, and will be noticed again; it throws no light on the original reasons for choice.

(5) Evasion of the interest-prohibition. As this prohibition did not obtain much strength until, say, the 1200's,¹ it is obvious that it could not have affected the original choice. Moreover, as it was only slightly in vogue in Germanic regions,² and practically not at all in Scandinavia,³ while thoroughly accepted in France, and as the sale for repurchase attained its highest development in Iceland and was least common in France, the choice of the sale for repurchase had clearly in its essence nothing to do with the canonical interest-prohibition. Finally, that prohibition in terms brought also, where it was actually enforced, the evasive sale for repurchase under its ban; so that there was little reason to prefer it as a method of evasion.

There were, then, apparently, no *legal* effects of the one or the other form, in the beginning, which could motivate any choice for either, by debtor or by creditor. Were there, then, any other circumstances to explain that choice?

2. The descriptive phrase in a passage above quoted, "*sub spe redemptionis vendita*," will perhaps best introduce us to the theory that will be here suggested. We are dealing primitively, it must be remembered, with a community in which the sale, and much more the pledge, of the family estate is all against the grain.⁴ It is a community in which the land is often held and cul-

¹ 1877, Darif, *Le Pret à Intérêt*, 129, 140 (placing the date at 1200+); 1891, Goldschmidt, *Handelsrechts*, I, 140: "Unfounded in many respects is the oft-repeated assertion that modern commercial law only very gradually threw off the fetters of the canonical principle; . . . not once was the Church able to enforce practically its prohibition of interest; . . . in the secular courts the prohibition did not come to be applied until the middle of the 14th century." Thus the opinion of Endemann (II, 339) and Neumann (186 ff.), that the interest-prohibition was the source of the resort to the sale for repurchase, seems inapplicable to earlier times.

² Neumann, 72, 183-194; Stobbe, *Priv.* 270; Endemann, II, 341.

³ Amira, I, 201, 661; II, 800.

⁴ See the exposition by Fustel de Coulanges of the religious and moral repugnance primitively prevailing against the transfer of land-property: 1891, *Nouvelles Recherches*, 78.

tivated in entirety by the family members;¹ in which the consent of all the heirs (even where genuine entirety does not exist) is requisite for a sale down to the latter Middle Ages; in which these heirs, till a still later period, have at least a right to buy back; and in which the alienation of land on execution to pay debts is the last step taken in that type of process. It is, moreover, a community in which bankruptcy brings a social stigma of a quality impossible for us to appreciate; in which it ruins the family, and makes "broken" men of its members. The stress which forces to pledge the family estate and to resort to the money lender is the last stage short of bankruptcy;² and it is a stage which the family does not wish publicly to acknowledge that it has reached. The transaction, then, which will raise the needed money, will leave the way open for a winning back of the family inheritance when its fortunes have been regained, and will at the same time avoid the stigma of being forced by a pecuniary need, is the transaction which will commend itself as the desirable one, wherever it is by means of the family inheritance that the money is to be raised. Such a transaction is the sale for repurchase. Moreover, two circumstances combine to favor it. In the first place, the aid will be sought by the debtor, if possible, from some more prosperous branch of the same family, because that will seem to the world a more natural transaction, because the buyer will take less advantage of the family need, and because, since they have only a *spes redemptionis*, the term within which repurchase can be made must be as long as possible. In the next place, such a person will be more likely to be willing to buy on terms of indefinite repurchase, because he will advance the money less from the desire to forfeit the land ultimately than from a wish to help his relatives over a time of distress. Where such a situation exists, then — the family inheritance the only means of raising the money, and a relative or friend indifferent as to the term of repurchase, — the sale for repurchase will always be chosen.

Three circumstances tend to show that this was in fact the motive for choice. First, the highest development of that form of transaction was reached in the communities — viz. West Scandinavia — where the mobility of land-capital was least, and where

¹ Heusler, I, § 50.

² "Nu kummet eyn man deme erbe [land] ist anisturben, unde spricht her, '*sy benotiget*, und meynet, erbe tzu verkummen'" (Kulm. R. Lib. IV, § 88, quoted by Weisl, 44).

the primitive integrity of the family estate was maintained longest and strongest; and it was smallest in the communities — viz. France — where the opposite conditions prevailed. Secondly, occasional passages show that this was in truth the motive for such transactions.¹ Thirdly, the process of the compulsory cutting-off of the transferor's outstanding right of redemption in case of an indefinite term, which we find fully recognized in the earliest Scandinavian records, was much later in being reached for the ordinary sale for repurchase, and in the Middle Ages is not reached at all for the *stammgut* or family-inheritance, which could be redeemed indefinitely at an era when a limit of twenty years was legally fixed for the repurchase of other lands,² — indicating that the sale for repurchase must have been the peculiar and legally favored resort of distressed families at a time when their redemption-right for an ordinary pledge could have been cut off in a limited time.

Such, then, seems the probable early motive for a choice, in certain conditions, of the sale for repurchase as against the pledge.

3. In later times, this motive would probably grow less. But by the later Middle Ages a new reason of preference, for the creditor at least, had sprung up. When the main mark of the collateral-security idea in a pledge — the restoration of the surplus — had become sanctioned by custom, and when the creditor, after finding that an *auflassung*-clause in advance would enable him to evade coming into court and restoring the surplus, was after all being compelled to come into court and perform this duty, in spite of the *auflassung*-clause (or *lex commissoria*) — say, in the 1400's and early 1500's, — he now found, or thought that he had found, an ark of refuge in the sale-for-repurchase form of transaction. This was not on its face a pledge, i. e. there was no principal debt to form a standard of liability and to determine whether anything or how much should be returned as a surplus, and hence there was no reason to say that the value retained by him on default of redemp-

¹ For example, in the Gotlandslage (Amira, I, 209) we read: "*When necessity begins to compel to alienate the land for the maintenance of the family before all the children are of age, there shall be transferred (festa) the share of each, but not by perpetual sale (fastu selia).*" In mediæval Japanese deeds a common phrase at the opening is: "This land has been owned by my ancestors for many generations; but now, owing to pressing need, it is transferred to the present purchaser for a price" (Wigmore's Notes to Dr. Simmons' Land Tenure, etc., Trans. Asiat. Soc. Jap., XVIII, 163). It is, indeed, by an observation of the clear facts of feudal society in that community that the writer has come to believe that a similar explanation is to be found for the *kauf auf wiederkauf* in the Germanic Middle Ages.

² Amira, II, § 69.

tion should be scaled down; that is to say, *if* the transaction had been in reality a sale and not the covering of a debt. The process of defeating the creditor in his new attempt, by altering the form of the transaction, to evade the law of pledge became, as we know, a notable feature of English mortgage law. The German law solved the problem in its own way;¹ but it is enough to note here the part which the *kauf auf wiederkauf* played, in its relation to the pledge, in the later mediæval law, and the form in which history presented the problem to modern law.

One thing only remains to notice. The *kauf auf wiederkauf* is the natural and chief type of the sale form as distinguished from the pledge form. But there is a subsidiary form, which, as Brunner has pointed out,² must be distinguished, — the sale on condition subsequent. This form was particularly popular in Lombardy,³ and also in England. In one variety, it merely requires the return of the *carta*, or deed, on payment of the sum.⁴ In another, it provides that the deed shall be null, and, sometimes and incidentally, returned.⁵ The legal difference seems to be simply that in the *kauf auf wiederkauf* the reversion of title on redemption requires a new and distinct transfer, while in the other form the act of payment *ipso facto* reverts the title. Brunner has sug-

¹ Whether a transaction is to be treated as a genuine sale for repurchase or a giving of collateral security only is to depend, according to the *Motive* of the new Code (II, 340), on the circumstances of each case. In the *Gewerbe-Ordnung*, regulating the trade of pawnbroking, it is provided (§§ 34, 38) that "the professional purchase of personalty with reservation of the right to repurchase shall be treated as a business of pawnbroking."

² *Rechtsg. Urk.* 194.

³ Kohler, 40, 94; Heusler, II, 136.

⁴ "Fecit Natigerius . . . cartulam vendicionis in manu Dadolo . . . ; si predicto Natigerius vel suos heredes fecit sanacionem de suprascripti denarii . . . , *reddere debet* Dadolo vel suos heredes *ista cartula rasa* sub pena dupli"; then a hybrid clause not invariably present: "et si . . . non fecit sanacionem . . . , deinde in antea ista cartula vendicionis firma et stabile permaneat sub pena dupli" (Kohler, 357).

⁵ "Promitte . . . quod si P. . . sanacionem [debiti] fecerit, *reddatis* si *cartam illam* venditionis quam in vobis amisit de petia una de terra, capsatam et taliatam *ut in se nullum obtineat robur*"; again, "[After a sale clause], *Ista carta facta est eo tenore: si ego . . . vobis . . . parati fuerimus ad dandum . . . de argento [amount and date] . . . , quod sit [carta] inanis*" (Val de Lièvre, 29, 33; in the Italian practice, this passage commonly formed a separate document from "ista carta" of sale); "Ista venditionis carta, nomine pignoris, tali tenore facta est quod qualicumque die ab hodie usque ad duos proximos annos A. reddiderit fratribus solidos mille, tunc ista venditio et *carta resolvatur, reddatur, et nihil valeat*" (Heusler, II, 136). There were other varieties also, some of which more or less distinctly referred to the transaction as "pignus."

gested¹ that the reason why the latter became popular in England was that the ordinary pledgee did not have the possessory action; but this does not explain the choice between the two varieties of the sale-form; and more satisfactory reasons might be found, which it would be out of place to discuss here. It is enough to note that this variety of sale-form, which later appealed to the creditor as a means to evade the pledge law, was early popular in Lombardy.

IV. *Tod-satzung*; or, *reckoning Profits against Capital*.

1. When the primitive notion of *wed*-payment prevailed, and was natural, no one thought of asking what became of the profits of the thing handed over. The *gewere*, or possession, of the pledgee gave them to him, just as the pledgor would have taken them by the same token. There is thus no question of "reckoning" the profits, or any part of them, against the capital, any more than there is of restoring a surplus; the pledgee simply takes the *wed* as a provisional substitute for what he would otherwise have had absolutely. But several circumstances later combine to raise the question. First, the notion comes forward of the debt as independently subsisting as a standard of the creditor's right. Secondly, pecuniary capital comes to be accumulated and used professionally and systematically, and its gains come to be thought of as measurable; so that what a debtor can borrow money for is capable of fairly accurate estimation. Thirdly, with the increase of infeudation, the multiplication of subtenancy and rent charges, and the systematization of taxation, land-values — in terms of rentals and the like — come to be more definite and fixed. All these combine to make the debtor understand the gain that a pledgee can secure merely by collecting the profits of land pledged, and to make him feel that he can afford to demand terms of the creditor as to the limit of this profit. In a given case, then, he may now demand that the profits received above a certain amount shall go to his benefit, — i. e. shall be used to reduce the capital sum for which the land is a substitute. It is in this stage that we find, say, the middle mediæval law, i. e. there shall be a reckoning of profits against the claim only so far as is expressly agreed.² In other words, *tod-satzung* is not a primitive form of *satzung*.

¹ Pol. Sci. Quart., 1896, XI, 541: "It [the ordinary pledge of realty] became impracticable in England and had no future there, because the gagee did not have the possessory action."

² Amira, I, 201; II, § 22; Heusler, I, 143; Meibom, 375, 399.

In the next stage the presumption has changed, and the imputation of some surplus of profits on the claim is deemed to be so generally understood that it is now for the pledgee to secure himself by stipulating that it shall not be made.¹ Finally comes the stage of modern law, when the pledgee is compelled invariably to submit to such a reduction.

The terms were various, most of them involving the notion either of "striking off" something from or "reckoning" something upon the principal claim, — "totslak," "abslahung," "absleg," "abslag," "afslach," "rekenyng," "rechenschaft," and in French and Latin sources, "acquitatio," "acquit," "computatione in sortem."² The method of computation was often by the valuation of experts,³ often by a court.⁴ It might take place without special prearrangement⁵ or at fixed times.⁶ Where the amount of the *abschlag* was not left to crop contingencies, but was fixed beforehand, the periods were of course thus supplied, and there was no resort to third parties for valuation.

2 a. The profits might of course be reckoned off by various schemes. (1) First, and presumably earliest, was the scheme most favorable to the pledgee; he was to take out first a fixed amount (whether called "interest" or not), and only the contingent surplus was to be reckoned against the principal sum.⁷ (2) Secondly,

¹ A special clause might be used: "nec computare . . . nobis tenebitur," or a phrase might suffice: "ane," "one," "on," "sonder," "sine," (all meaning "without,") followed by one of the words mentioned in the text: Kohler, 133, 108. Another form, having exactly the same purpose, but more usual in the south, was: "et quicquit fructus quos inde tollere potuerimus, de super et de subtus, inclitum illut novis aveamus faciendi ex eo quicquit voluerimus"; "quid de fructum exierit, quicquit facere voluerimus" (Kohler, 87, 88, 89, 91).

² Kohler, 258, 133, 309. *Todsate* was the phrase for the species of *satzung*. The French phrase *vifgage* will be later explained.

³ "Sub testimonio bonorum virorum" (Kohler, 105).

⁴ "Als oft auch ein totalslak in dem obgenanten gericht geschee" (Kohler, 258).

⁵ "Allodium meum . . . pro pignore exposui . . . quousque prefata ecclesia dictas XXXII libras plene et integraliter sub testimonio bonorum virorum receperit" (Kohler, 105).

⁶ "Dat sullet se alle yar myt uns rekennen als dat korn gemeynliken gyldet up deme markede to derne Berge eynis Sunabindes vor und eynes Sunabindes na sente mychahelis dage" (Kohler, 108).

⁷ A house is pledged for 10 marks; the pledgee "de conductione domus unam marcam tollat pro censu, et residuum deputabit de decem marcas quousque suas decem marcas deputabit" (Kohler, 106); pledge of land for a debt of 600 marks, "until they [pledgees] from the above mentioned use and fruits, over and above the 60 marks which they shall each year receive from the said, etc. . . . have paid themselves the said 600 marks," etc. (Kohler, 132); pledge of a village for a debt of 1500 gulden at the

and presumably later, or when the debtor can make better terms, it is the pledgee whose profits depend on a contingency, the principal sum being cut down by a fixed yearly or monthly amount from the fruits.¹ (3) Still a third way was for both parties to risk the contingencies, dividing the gains equally.²

b. Was there any way in which the *abschlagung* varied the nature of the pledge, so that the *res* itself ceased to be thought of as the equivalent of the *sors* (or principal sum), and the use or profits, i. e. the usufruct, was regarded as the real subject of the pledge? If there was, we may be in presence of a new and wholly distinct species of pledge, as Franken maintains.

There were two arrangements which on their face might be open to that construction. (1) The application of the *entire* profits of the *res* to diminishing the principal sum.³ Here no interest is mentioned; and it might seem that the profits or the use was treated as equivalent to the capital when spread out in instalments without interest. But, by the simple expedient of increasing nominally the principal sum, the pledgee could, and undoubtedly did, protect himself, and the transaction did not differ from that with the ordinary *abschlag* of the surplus.⁴ (2) The assignment of a

interest rate ("zu rechter gulte") of 1 for 15; the pledgee to take the profits "nacht antzale der obgeschriben gulte von funfftzehen guldein einen guldein," and "was aber uber dieselben gulte daselbst gefellet" the pledgee is to "ungehindert werden und volgen lassen uns" (Id. 335).

¹ The pledgee is authorized "predictum pignus ingredi et habere godimentum pro lucro [naming amount] denariorum, et habere de omni libra omni mense denarios sex donec debitum sit solutum" (Kohler, 108); pledge of a house, "quod [naming pledgee] singulis annis ad diminutionem debiti unam marcam argenti, quousque dictam donum redimamus, in sortem computabit" (Id. 111); pledge of a serf for a 6-mark claim, 1 mark to be counted off yearly (Id. 259). But we are not to assume, perhaps, that the pledgee was here less favored; for obviously the *res* pledged might be so large that the fixed *abschlag* left a relatively high interest to the pledgee.

² "Als oft auch ein *totslak* in dem obgenanten gericht geschee, was davon zu busse und beaserung mak gevallen, dieselbe besserung schol uns und unsern erbe *halbe*, und das ander *halbtheil* dem [pledgee] und seinen erben ongeverde volgen und gevallen" (Kohler, 258).

³ For example: "Nec ego [pledgor] nec aliquis heredum nos intromitemus nisi [naming pledgee] primitus et ante omnia receperit et requisierit de ipsis bonis et eorum redditibus debitum quinque marcarum" (Kohler, 130); "ut omnis introitus . . . percipiat usque ad solutionem vestri prestiti" (Id. 131).

⁴ Thus (Kohler, 308), a certain Rudolph, in 1315, recites in favor of the pledgee a debt of 150 pounds by deed, a debt of 50 pounds for loss suffered in rendering help in a war, and another of 50 pounds "for the service which he shall now do us," making in all 250 pounds; and for this he pledges "unser gerihte ze Hembau" providing that the income "von dem stab und von dem chorngül" shall be "niht abslahen," but the income "von den stiuren und von zinsen" shall be "alles abslahen," and the pledgee

fixed rent to pay the principal sum. Here, also, as just suggested, the fictitious increase of the principal might enable the pledgee to secure in reality both principal and interest. But, apart from this, the purpose of the pledging of a rent was not regularly, perhaps not even usually, to pay the principal sum; it was constantly used, on the contrary, merely to supply the interest, while leaving the principal sum standing for later redemption by a payment independent of the rent.¹ That is, the equivalency was between the rent and the interest, not the rent and the principal sum regarded as payable by instalments.

In the cases, then, where the entire profit or a rent charge is to be applied to the principal without mention of interest, there is not necessarily a new variety of pledge; the notion of *abschlag* is merely employed to evade the prohibition of interest (where that prevailed), and the transaction may be in fact essentially the same.

3. In the mere methods of *abschlag*, then, or in the fact of its use, there is nothing essentially different in the theory of the pledge. It is the *res* that represents the principal sum, as ever. The view of Franken,² that the *satzung* with pledgee's use and an *abschlag* is essentially a mere transfer of use or usufruct, is therefore not a necessary consequence of the *abschlag* feature in itself. But there are further indications, of a positive and not merely a negative bearing, that the provision for *abschlag* is merely an incidental feature in the growth of the ordinary *wed* pledge.

(1) In the first place, we find the *abschlag* treated in the documents on the same footing as other provisos, such as the pledgee's duty to restore surplus, or his claim for deficit.³ That is, at certain stages of the development (as already explained) towards the pure

shall continue till the whole sum is paid. Here, obviously, the last 50 pounds might be purely fictitious, so that the "alles abslahen," even of the entire income, might be made to pay the real debt and a good interest also.

¹ "Decimam vinearum [naming pledgor] in vadimonium posuit pro XV^{lm} solidis [naming pledgee], tali facto ut quando [pledgor] XV^{lm} solidos reddere vellet, decimam libere recuperaret" (Kohler, 95, also 105). The nature of the transaction is clearly brought out by such agreements as these: For 50 marks capital, a rent of 5 marks is granted, and "as soon as we the pledgor pay 25 marks, the rent to the extent of 2 pounds is released to us" (Kohler, 243, also 107).

² His book deals with French law, but he seems evidently of the opinion (142, 186, and elsewhere) that his conclusions are also valid for the pure Germanic law.

³ Thus: "*ungerechent*, ind up yre kost, *wynnonge*, ind *verluyst*" (Kohler, 133); "*nec computare nec respondere nobis tenebitur*" (Id.); a provision for non-accounting for profits, followed by a provision for restoring on default the surplus value of the *res* (Id. 88).

idea of collateral security, these matters had to be expressly provided for, and, along with these, the notion of "reckoning" surplus fruits on the capital, which was equally a step towards the collateral security idea, was treated in a perfectly natural way as one of the germane matters to be settled beforehand. So also a forfeiture-clause (the mark of the forfeit-idea) will be found side by side with a clause dealing with the *abschlag*.¹

(2) Just as the forfeit-idea was got away from by agreements that the pledgee should not keep a surplus, and the pledgor should pay the deficit, the one being in a sense the complement of the other, so the *abschlag*-agreement, which did away with the excessive profits otherwise to be made by the pledgee, had its complement in the shape of an agreement by the pledgor to make up any deficiency of the fruits below a certain rate.² In other words, the notion that there should be a limit of interest-profits, beyond which the pledgee could not keep them with fairness, could not be reached without reaching also the notion that a deficiency below that rate should be made up to him by the pledgor.

(3) Except for the case of rent (above explained), the pledge is of the *res*, not the fruits; and in all the minor and indescribable features of phrase the pervading spirit of the documents is that of the ordinary *wed*.

Looking at the *satzung* with *abschlag*, or *todsatzung*, then, in the light of the general notion of *wed* or *satzung*, it seems to be nothing more than the ordinary *satzung* with a feature representing the progress towards the idea of collateral security, i. e. with a limitation upon the pledgee's rights, based on the notion that the principal debt and its interest form the standard of claim, for the sake of which the *res* is to him merely a collateral security, and beyond which he should keep nothing. The duty of the pledgee to return the surplus of the *res*-value above the principal sum is of

¹ "Impignoravimus tibi . . . , et facies de ista vinea quid de fructum exierit quicquid facere valueris, usque in tercio anno, et si a tercio anno non potest adimplere ipsum precium in ipsa convencione, ipsa vinea permaneat . . ." (Kohler, 91, also 87).

² Thus: "Impignoro vobis curtilem unum [describing it] pro solidis XV, eo tenore ut tandiu predictae ecclesie monachi ipsum curtilem teneant, donec ipsum debitum persolutum est; ita tamen ut singulis annis tres modios et dimidium de vino eis reddatur [i. e. as interest-fruits], et si in ipsa vinea tantum non habuerit, ex meo alio tantum persolvam" (Kohler, 91); "impignoramus vobis . . . ut tamdiu teneatis vos hanc terram quamdiu reddamus vobis hoc pretium; et ipso anno quo hec terra non reddiderit fructum, nos persolvamus vobis unum modium vini" (Id. 92); a pledge for 700 marks, with 70 marks annually as a first charge on the fruits for interest, and other charges up to 250 marks; if more is yielded, a reckoning upon the capital; if less, the pledgor will make it up (Id. 106, also 116).

a piece with his duty to return the surplus of the profits above the interest-rate, and the stages of development are similar and almost parallel. Wherever legislation has allowed the pledge without *abschlag* to survive, it is only on the theory that the pledgee will also have the risk of a deficiency or total lack of fruits, and hence should have the chance of profit along with the risk of loss.

Wherever, too, we find historically a reckoning of all the profits upon the capital, without allowance for interest, we are to suppose that it is merely an attempt to evade the canonical prohibition against taking interest, and not that it is a separate type of pledge. To suppose that, as a customary thing, and apart from casual cases of friendship, loans will be made with no charge at all for interest, and that there could be a type of pledge based on that theory, is to suppose moral impossibilities. In short, but for the interest-prohibition, and the effort to evade it, there would have been practically no resort to that particular and extreme form of the *abschlag*-transaction.¹

2. JEWISH LAW.²

I. From the point of view of etymology, the translators give us no material assistance. We do find, however, in unmistakable clearness, the chief marks of the forfeit-idea.

1. No claim by the pledge for deficit where the *res* has perished

¹ A conclusion corroborated by the fact that this form of "reckoning" (i. e. "*toutes les despuelles [profits] . . . sunt rabatues de la dette*"), constantly insisted on in France (Franken, § 8), where the usury-ban was in force, never came to be the law in Germany or Scandinavia, where the usury-ban had little or no force (Neumann, 72, 183-194; Stobbe, Priv. 270; Endemann, II, 339; Amira, I, 201, 661; II, 800).

² In the Jewish law there is often a special opportunity to note the different stages of a doctrine, because the law itself is preserved in three distinct stages, viz. the Pentateuch, the Mishna (a kind of codified customary of not later than 300 A. D.), and the Ghemara (a body of commentaries on the Mishna, the commentaries of the Jerusalem school being collected about 400 A. D., and of the Babylon school about 500 A. D.). The opinions of the early rabbis formed the Mishna; and this again was developed by constant discussion into the body of commentaries called the Ghemara, which purports simply to record the results of one or two centuries of discussion. Moreover, the Jewish law shares with the Roman, the English, and the Japanese the feature of having been developed largely through the discussion of cases and principles and the citation of precedents, — an indication of what may be called the juristic instinct. References: 1866, Mayer, *Die Rechte der Israeliten, Athener, und Römer*; 1893, Bloch, *Der Vertrag nach Mosaisch-Talmudischer Recht*; 1888, Schwab, *Talmud de Jérusalem*; 1860, Rabbinowicz, *Législation Civile du Thalmud*. The last two are translations of the Talmud, and are the only satisfactory sources. The citations of the Talmud will here be given from Rabbinowicz, by volume and page, with the additional citation of the folio of the original books (Baba Metzia, etc.) as marked in Rabbinowicz.

by accident or has deteriorated. According to the Mishna, the pledgee was as bailee responsible for all loss (including theft or destruction) short of the act of God or an enemy, or other inevitable loss, i. e. a stage somewhat beyond that of the primitive Germanic law.¹ Here as there, the inability of the pledgee to recover his debt after a loss of the pledge might perhaps be attributable to his liability as bailee, but for two circumstances; viz., that the pledgee loses his whole claim (and not merely the value of the *res*), and that the equivalency of the *res* and the claim are expressly predicated.²

2. No duty of the pledgee to restore the surplus. This also is perfectly clear as the starting-point of the Jewish law; but as most of the passages deal with it in connection with the hypothec and the *auflassung*-clause, we may postpone it for a moment.

3. The *auflassung*-clause or forfeiture-clause (*lex commissoria*) was evidently resorted to in the same way as in Germanic law.

¹ R., III, xxxiv, 23, 357, 377 (Baba Metzia, 5, 80 ff., 93). There were three degrees of responsibility: (1) bailee without pay (*schomer kinam*); (2) bailee for pay (*schomer sakhar*, with whom usually ranked the *sokher* or hirer); (3) gratuitous borrower (*schoel*). The first was responsible only for loss by fault; the second, for loss as above limited; the third, for all loss.

² At the time of the Ghemara, Rabbi Eliezer advanced the proposition (Baba Metzia, 357) that the pledgee should be put in the first class, i. e. on proving himself not in fault, he "might demand payment of the debt." But on the opposite side, R. Akiba claimed (R., III, 366): "The debtor may say, 'Your loan was merely on this pledge; if the pledge is lost, your money is lost';" i. e. R. Akiba was for standing by the older Mishna rule. But R. Eliezer was willing to concede that, "if that pledge was given after the loan was made," then "if the pledge was lost, the money was lost," for there the equivalency would be perhaps clearer. Still another distinction was tried; R. Samuel had illustrated the Mishna rule by saying: "If a person lends to another 1,000 *soumes* on a *res*, and the *res* is lost, the claim is lost, in spite of the excess of value [of the claim]"; and the later rabbis now attempt to refine away the Mishna rule by suggesting that it applies only where the *res* is more valuable than the claim, and not where the loss of the *res* still leaves, if set off, a deficit in the claim; i. e. they were advancing the notion which we have already seen carried out in the later Germanic law.

There is one passage looking the other way (R., III, 161, Baba Metzia, 34), in which it is disputed whether the pledgee, by taking an oath that the loss is not his fault, may recover the deficit from the debtor; this is easily explained as representing a later stage of discussion, when R. Eliezer's view had prevailed.

An illustration of the primitive principle is found in the discussion and affirmative settlement (R., III, 231, Baba Metzia, 48) of the proposition that a debt larger than the *res* in value is extinguished in the *schmitah* or seventh year (according to Deut. xv, 1-6: "At the end of every seven years . . . every creditor that lendeth ought unto his neighbor shall release it; he shall not exact it, etc."); the very question is evidently a product of a new collateral-security idea; for if originally the debt had been treated as surviving the pledge-transaction, it would as of course be extinguished in the *schmitah*; the question's discussion in the Talmud times shows that the idea of the debt as independent of the pledge was then novel, and hence the applicability of the *schmitah* rule had just occurred to the minds of the rabbis.

The primitive notion of the pledge apparently allowed the pledgor, as in Germanic law, to redeem without limit of time.¹ But pledgees resorted to a form which seems to have exactly the same significance as the *auflassung*-clause, and this was, in the Mishna era, lawful :—

“ If a man lends money to another on his field, and says to him, ‘ If you do not pay me the debt three years from now, the field shall belong to me,’ in this case the field belongs to the creditor, if the debtor does not pay. This was the ruling of Baithous, son of Zonin, with the assent of all the doctors of the law.”²

By the time of the Ghemara, a later stage of opinion had been reached, and the view that the pledgee should be compelled to restore the surplus, or — what was almost the same — allow the pledgor to redeem in spite of the forfeiture-clause, was being advanced and had almost prevailed.³ We see here ample evidence that originally the *res* went in whole to the pledgee as an equivalent or forfeit, without regard to the surplus; that when the duty to restore the surplus was recognized, the pledgee’s method of evasion was to employ a forfeiture-clause; and that finally the duty to restore emerges again successfully in opposition to this clause.

II. The hypothec, or pledge without pledgee’s possession. The discussions of the rabbis show clearly enough that the hypothec was no different institution from the pledge, but was merely a postponed pledge, bearing all the peculiar marks of the forfeit-idea, and show the same stages of development.

¹ The custom of the district of Nehardea was to preserve the right of redemption forever, though a limitation to twelve months was claimed; the Ghemara decided (Rabbinowicz, III, 166, Baba Metzia, 35) that the custom was right, except that it should not apply to purchasers from the pledgee. We see here the process, found in Germanic law, of an originally unlimited redemption, cut down later in order to give the pledgee the power of disposal.

² R., III, 277 (Baba Metzia, 65). Another form, already seen in Germanic law, provided that the pledgee should, on default at maturity, be regarded as buying the *res* from the pledgor for the amount of the claim; but by the time of the Ghemara this also was disputed as improper (R., 279, Baba Metzia, 65).

³ Citations in preceding note. The Ghemara discuss this passage of the Mishna, and their opinions are divided. One distinction proposed was that the rule should not apply if the agreement was made after the loan given; but “ Rab Nahaman said that, even though making it only then, the creditor could obtain the whole field.” Yet, “ later, Rab Nahaman changed his opinion, and said that, even if he makes the agreement at the time of the loan, the creditor does not get the field.” The opinion of Nahaman was the weightiest of the time, and the great majority agreed with him.

The doctrine of *asmachta*, or usurious gain, as here applied to this transaction, is said by Mayer (§ 196) to have been first invoked by the Babylonian school in the 400’s; indicating the relative lateness of the resort to it, here as elsewhere.

1. The regular form of the hypothec was that of a postponed pledge: "If I do not pay the debt of [naming the sum] in one year, my field shall belong to you."¹

2. In the hypothec, as in the pledge (as we found in Germanic law), the marked incidents equally prevail of the pledgor's non-liability for a deficit, in case of destruction or deterioration, and the pledgee's non-responsibility for return of the surplus. In the stage of the Ghemara discussions, we find these primitive features being disputed and effaced, in the direction both of the pledgor's deficit-liability,² and of the pledgee's duty to forego the surplus-value.³

¹ R., III, 267, 277, 282 (Baba Metzia, 63, 65, 66); I, 370 (Khetouboth, 43). Moreover, the deodand rules show the same unity of idea. The deodand (or forfeiture of a harm-causing animal, etc., leaving the owner quit), as is well known, was as marked a feature of primitive Jewish law (Exodus, xxi, 28) as it was of Germanic, Greek, Roman, and others. The Jews divided such animals into two classes (R., II, 49, 54, 164, Baba Kama, 16, 18, 36); *tham* was the animal *mansueta natura* injuring for the first time; *monad* was the animal by nature dangerous; for a *tham*'s injury, the owner paid only one half the damage and with the body of the *tham* only; for the *monad*'s, the whole, and was personally liable for it. The former was called "paying by *migoupha*," i. e. by the body of the animal, i. e. as by *wed* or forfeit. Now the significant thing is that the injured person's claim in the former case is spoken of and treated as a hypothec; if the ox died or was killed, the injured person is without redress beyond the carcass-value, although he suffers a loss in the diminishing of "the value of his hypothec"; moreover, in the former case (of the *tham*), if the animal was sold, the claimant could seize it in the buyer's hands (as we shall see he could do for a hypothec); in the latter case, he could not follow it.

That the hypothec was peculiarly employed for contingent defaults may be assumed from the circumstances that it was used to secure the wife's *dos*, and that the ordinary pledge with re-lease to the pledgor (R., III, 290, Baba Metzia, 68) co-existed.

² "If a man binds his field by hypothec to his creditor, and this field is destroyed by a flood, Ami Schapirnaah said, in the name of Rabbi Johanan [i. e. as a disciple quoting or speaking for his master], that the creditor cannot pay himself from other goods of the debtor"; but Rab Nahaman would allow this result only where the debtor had expressly said, "I pay you out of this hypothec only"; [i. e. only in case of express agreement, — a later stage already noticed in the Germanic law]; Rabban Simon would allow it only for a wife's hypothec for her *dos* (R., I, 368, Gbitin, 41). But the first opinion is elsewhere sanctioned (R., I, 54, Betzah, 4).

The same primitive notion is betrayed in the rule (R., I, 183, Khetouboth, 56) that the *res* on which the husband gave a hypothec for the *dos* received could not be movables, for they might deteriorate in value; it must consist in immovables, unless the husband would guarantee the value of the movables. In other words, the risk of deterioration was on the hypothecary, in the absence of express agreement.

The custom of appraising the *dos* at the time of giving a hypothec for it (R., 192, Khetouboth, 66) is one found in other laws, and seems to be based on the notion that the *res* then set out as the equivalent of the *dos* is the absolute and sole resort of the hypothecary, at whose risk it deteriorates in value.

³ R., II, 383 (Baba Kama, 96); III, 64, 75, 310, 448 (Baba Metzia, 14, 15, 72, 110). The original notion evidently prevailing up to the time of the discussions here re-

3. The pledgee could follow the hypothec in the hands of a third person, whether buyer or second pledgee.¹

4. When a hypothec had been given, other creditors apparently could not seize it nor a second hypothec be given upon the same *res*.²

III. Sale for re-purchase. This form was apparently understood,³ and was apparently available for evading the pledgee's duty to restore the surplus; but we are without any evidence as to its history, nor are there any documents to reveal the exact difference of terms and form between this and the real pledge.

IV. Reckoning of profits (*Vifgage*). The Jewish rules on this subject do not clearly appear; but as we know that, until the rabbis' disapproval of the keeping of profits on industrial and commercial transactions, the pledgee must have kept all the fruits, and as such profit (*abakaribith*) is in the Talmud still not absolutely prohibited except by the opinions of some, we are entitled to infer that the features of the Jewish law were the ordinary ones of a progress from an unlimited enjoyment of fruits by the pledgee to the final duty to restore the excess over a fair gain.⁴

corded was that the creditor took from the debtor the whole of the hypothecated *res* on default, and therefore (since, as we shall see, he could follow a hypothec into a purchaser's hands) from a purchaser also. The questions that were now discussed were: (1) whether he could take improvements also, or must pay for them; (2) whether growing crops were improvements; (3) whether the buyer could demand a piece of land, instead of money, for the improvements. The better opinion was that he could take the improvements also without paying for them; though an apparently later distinction, made by some, would allow him to do this only where the debt was greater in value than the *res* alone. But that the buyer could pay off the creditor and keep the land was never agreed to: "the buyer cannot keep the field against the creditor's will, for the creditor takes it as his hypothec"; though the contrary view was occasionally advanced (apparently however for land taken on execution only, and not for a genuine document-hypothec). Moreover, in all cases, apart from the question of paying for improvements, the relative value of the debt and of the *res* was treated as immaterial. It was even discussed (R., I, 265, Khetouboth, 92) whether the creditor who went to seize the *res* in the hands of the purchaser could be forced to accept instead the payment of his claim by the debtor.

The custom of marking out the limits of a land-hypothec beforehand (R., III, 64, Baba Metzia, 14) was apparently due to the principle that the creditor obtained not merely a lien for a certain value but a right to a specific *res*.

¹ See the citations of the preceding note. But this, as in Germanic law, was not true of movables (R., II, 32, 51, Baba Kama, 12, 33; R., IV, 145, Baba Bathra, 44).

² R., II, 164, Baba Kama, 36.

³ R., III, 280, Baba Metzia, 65.

⁴ The Jewish laws of usury have been the subject of as much difference of interpretation as the command of Jesus of Nazareth, "Δανείζετε μηδὲν ἀναλίσcentes." It is enough to say that the original prohibition of gain by mere lending was in the Pentateuch

3. JAPANESE LAW.¹

I. Etymology gives us no assistance, — except that the generic word for pledge, *shichi*, is also used to-day, like *pfand*, to mean a forfeit in a game. But the two leading features of the forfeit-idea—

limited to the profits from money, while only under the rabbis was this extended to the profits of commerce and of industry (R., III, xxv). The Jews were originally (contrary to the popular opinion) in no sense a commercial or money-lending people; they were a purely agricultural and pastoral people; so that their emphatic opposition to the gains of the money-lender, like that of the pastoral Arabs (in Mohammedan law) is easily understood. There were, however, recognized ways for the pledgee to evade the strict rule and obtain a profit on his lending. In the first place, the Mosaic prohibition would merely exclude the taking of interest as on the money loaned, and hence covered only *ribith ketzoutah* (specified interest), i. e. an express agreement to pay an interest by means of the *res*-profits. Thus, if nothing was said about interest, but the pledgee as possessor took the profits of the land, it was only *abat ribith* (imprint-on-the-dust of usury), in other words, *de facto* interest only; and as this was merely disapproved by the rabbis, not forbidden by Moses, it could be done; much as Glanvil condemns the usurious mortgage, but admits that it is not prohibited in the King's Court. Nevertheless, this absolute enjoyment of the profits was not without its opponents in the Ghemara. One view was that a fixed sum yearly out of the profits should be set off against the principal, so that after a term of years the land redeemed itself. Another plan was to allow a five years' use without accounting, and thereafter to reckon the whole annual profits against the principal. By either of these two plans, the pledgor could not redeem within the period; but where no accounting at all was required, he could redeem at any time. Still another opinion was for a complete accounting of the annual profits from the beginning until the principal was paid (R., III, 284, Baba Metzia, 67).

Thus these various expedients do not differ in their essence from those we have observed in Germanic law. They assume no different theory of pledge, and they illustrate merely the effort to compel the pledgee to restore an excess of profits.

¹ Politically (though not socially nor artistically) Japan lingered a century or two behind feudal Europe in development; and the state of legal ideas at the Restoration of 1868 was not dissimilar to that of Northern France under Louis XIV., or of Germany in the time of Frederick the Great. A multitudinous variety in local usages still prevailed, and the centralized justice of the Shogunate had only a limited influence towards uniformity. The leading features of the customary law at that time have been recorded, though not with the detail that could be wished; but this very variety has preserved the various stages of development of the pledge-idea, though it leaves the order of development to inference only. The legal documents and judicial precedents, however, give us some evidence on this point, and justify more certain conclusions. Here, however, as in other systems, some features are fully represented in the sources, while upon others the data are meagre.

The references following are to the Supplement to Volume XX of the Transactions of the Asiatic Society of Japan: "Materials for the Study of Private Law in Old Japan," Parts II and III, "Contract: Civil Customs" and "Legal Precedents, Loans," and Part V, "Property: Civil Customs," edited by the present writer; the citations are by Part and page, with the name of the province of which the custom is recorded. The manuscript translation of Part VI, "Property: Legal Precedents," and Part III, Section III, "Contract: Legal Precedents: Pledge," not yet published, is referred to as MS.;

the pledgor not liable for a deficit, and the pledgee not bound to restore the surplus — are clearly seen, and the stages of progress are distinguishable.

1. In the translated records there seem to be only three instances of the former rule; but they justify the conclusion that it originally prevailed generally;¹ and there are evidences that, in some places at least, it had been departed from by express clause.²

2. The presence and the persistence of the latter principle appears on almost every page of the records.³ In later times we hear of the use of a clause providing that the pledgee shall restore the surplus;⁴ and in the hypothec (as we shall see) this principle had become a fairly regular rule of law.

3. The use of the *auflassung* to assist the creditor is shown with great fulness in the records, and offers an unmistakable and remarkable similarity to the Germanic law. We do not know enough about the history of property-law in Japan to be able to analyze the elements of a transfer-transaction, and the universal employment of written documents for the purpose has tended to obscure the original elements. But we know that for a perpetual and absolute sale of land a quitclaim-clause, similar in phrase and in pur-

unfortunately no closer indication than chapter and section can here be given; for a list of the chapters and their titles, see p. 13 of the Introduction, Part I, to the "Materials." There are also references to Simmons, Notes on Land Tenure, etc., edited and annotated by the present writer, in Trans. As. Soc. Jap., XVIII, 37.

¹ II, 113, Echu: "If the article pledged is lost or destroyed by flood, fire, theft, or other unforeseen event, the pledgee is not liable to make compensation, nor the debtor to pay the debt"; III, Sect. III, c. V, § 2, MS., Regulations, undated, for the pawnbrokers' guild; in case of fire or robbery, it is to be the "loss of both" (*ryo-son*); but of destruction by rats or insects, the pledgor's loss (i. e. as we saw for the same phrase in the Sachsenspiegel, the pledgor is told that he cannot hold the pledgee to his absolute liability, but it is assumed as clear that the pledgee has no claim on the pledgor); VI, c. IV, § 3, MS., a regulation of the early 1700's, that on the flight of a bankrupt or criminal pledgor, the *res* was sold by the authorities, and the loss, if there was a deficit, was the pledgee's.

² We find agreement-clauses (II, 102, Echizen; 113, Suwo) limiting the pledgee's liability for "calamity of Heaven" (*ten-sai*), and we may infer that a corresponding change in the pledgor's liability was also thus effected.

³ II, 91 ff. The frequent phrase for realty is: "On default, the property is forfeited," without any mention of restoration of the surplus. We find, in 1744, a Shogunate ruling (VI, c. IV, § 2, MS.) even going so far as to return a part-payment, where a final default had occurred, and to let the pledgee take the land in forfeiture. For personalty, the rule seems to have persisted till very late: II, 112, Kai; 113, Echu, Idzumo, Suwo (these last three are of the most old-fashioned provinces); III, Sect. III, c. V, § 2, MS., regulation of the pawnbrokers' guild.

⁴ VI, c. IV, § 3, MS., clause providing for return of *mashi-kin* (surplus), date uncertain; another similar document, dated 1827.

pose to that of the Germanic law, was common, and was perhaps essential to convey complete title.¹ Moreover, the primitive stage of the law, for a pledge, was that it was indefinitely redeemable.² The pledgee, of course, strove to obtain the cutting off of this right; and accordingly we find the next stage represented by the rule³ (obtaining probably in the majority of provinces) that, when ten years had elapsed after default, redemption was cut off. That this result primitively involved some such process as the German *aufbietung* or offering-about, already described, is almost certain from the occasional mention of this process as surviving,⁴ and that the process involved the idea of curing a defect of title appears from the fact that a final entry is usually mentioned as being made in the title-register.⁵ Meanwhile, however, the pledgee had found out that by means of an *auflassung* in advance the cut-off could be accomplished without legal proceedings. The pledgor's clause explicitly appears as a quitclaim.⁶ A discussion arose in the Shogunate courts, in the 1700's, which neatly brings out the nature of the process as that of curing a defect of title; the dispute was whether it was enough to put such a clause in the deed of pledge, or whether a special document of release must be additionally given by the pledgor.⁷

¹ Thus, for a sale in perpetuity (II, 43, Iwami): "Neither I nor my descendants may hereafter raise objection to this transfer"; so also II, 98 Hida; a typical document of the same sort is also given in VI, c. II, § 2, MS.

² Such a custom survived in many places: II, 93, Ise ("there is no permanent forfeiture"); 100, Iwashiro; 101, Uzen; 107, Awa ("an old custom permits redemption at any time within several tens of years").

³ II, 92, Settsu: "The usual term is one year; but the instrument remains valid for ten years; if at the end of that time the debt remains unpaid, the property becomes the creditor's forever"; so also 95, Totomi; 96, Kai; 98, 100, Shinano; 105, Harima; 109, Chikugo. The ten-year limit is laid down by the Shogunate in a regulation of 1779 (VI, c. II, § 2, MS.); but it also appears as early as 1721 (Simmons, 214, Appendix).

⁴ II, 109, Buzen, where the pledgor is twice summoned, and then the final entry of transfer is made on the register; compare also the frequent custom (II, c. III, pp. 13 ff.) of offering about to the villagers, in case of an intended sale, to cut off their preferential right to purchase.

⁵ E. g., II, 108, Iyo.

⁶ VI, c. IV, § 2, MS.: "I shall never make any claim to the contrary"; ib. § 3: "The land shall be delivered to you on default, and I shall make no objection." This is the regular phrase.

⁷ The common form of the pledge-document contained no forfeiture [*nagare*]-clause (see e. g. II, 99); and in 1729 we find the following question submitted to the Shogunate judges (VI, c. IV, § 2, MS.): "It is the custom in Totomi provinces for the pledge-document to contain the area of the land, the amount borrowed, the term of repayment, and clauses that the land will be returned if the money is then paid, and if it is not paid, the land will be absolutely forfeited; and when the default occurs and forfeiture is to ensue,

This force to the forfeiture-clause was given as late as 1783 in the Shogunate courts.¹ But in a discussion towards the end of the century² the injustice was noted of forfeiting land excessively greater in value than the debt, though the document was still regarded as controlling; while by the early 1800's we find it settled that, on the bankruptcy of a debtor, a pledge must be sold and the surplus handed over to the second creditor.³ The modern point of view had probably been reached by the Shogunate courts in this century, though we have no record of it, and though the local customs still show the old idea continuing in full force at the Restoration. But in the hypothec, to which we now turn, the result had long been reached.

II. The hypothec amply appears to have been originally of a piece with the pledge.⁴ Moreover, the notion seems to have been precisely that of a contingent pledge.⁵ The form was: "If I default in payment, the land shall be transferred to you as pledge,"⁶

a special deed of forfeiture [or release] must be given to the creditor by the pledgor. If now a pledgor demands the privilege of redeeming land long before forfeited, but for which a release-deed has never been given, what should be the decision?" Answer: "The land is not to be treated as the absolute property of the creditor, and may be redeemed; because, if no release-deed has been given, it is not an absolute forfeiture, in spite of the clause that the land should be forfeited and in spite of the lapse of time." But in 1733 (ib.) we find the Supreme Court refusing to allow a redemption after default where the *nagure*-clause exists in the original deed of pledge; and in a later document (ib.) we find a clause that the pledgee should own forever on default treated as sufficient to cut off redemption. Where neither clause nor release-deed existed, the legal ten-year limit would apply (ib.).

¹ VI, c. IV, § 2, MS.

² VI, c. IV, § 3, MS.

³ Ib., for Osaka, by 1790; III, 75, 209, for elsewhere, a little later.

⁴ In the first place, the word was originally the same, i. e. *kaki-ire-shichi* (II, 91, 93); in the next place, the term *shichi* alone was used in several old-fashioned provinces, even where the pledgor retained possession: II, 102, Wakasa; 104, Sado, Idzumo, Hoki; 107, Sanuki; 109, Hizen; 110, Higo; 92, Settsu.

⁵ In the term *kaki-ire* (often used for short, instead of *kaki-ire-shichi*), *ire* is "put," "place"; the *ire* being the generic verb, as in *shichi-ire*; German *setzen*, Greek *τίθημι*, Latin *ponere*. The *kaki* is now written with the ideograph for "write," and on its face would mean the written document or register-entry. But a document or entry was equally customary for the ordinary *shichi* (II, 2 ff.); and there would be no reason whatever for distinguishing the former as "written." Now *kaki* also means (in another ideograph) "hang," "suspend"; and as the common people go much more by the spoken word and the syllabary than by the ideograph (which is like our Latin-derived word), it is perfectly possible for the original word to have become mis-written. Moreover, in Yamato, the oldest and most classic province, we find the customary term (II, 91) to be *kari-kakitsuke-kaye*, meaning exactly "provisional" or "contingent alteration of the register."

⁶ VI, c. IV, § 3, MS.

or, "If I fail to pay at the appointed time, the property is to be yours, and is to be transferred to your name on the register";¹ the latter employing the later forfeiture-clause.² It is clear that the original usage, as seen surviving in a few places,³ was to forfeit absolutely on default, without regard to surplus. But a later stage is the more common one recorded, in which the property on default is sold and the creditor paid out of the proceeds.⁴ The records of customs do not throw much light on the corresponding development of the pledgor's duty to pay the deficit; but the single express mention of the subject⁵ reveals the pledgee's duty to restore the surplus already reached while the pledgor's deficit-liability is still unrecognized,—as in Germanic law. In the judicial precedents of the Shogunate the same stages of development are represented.⁶ It thus appears that, both in the Shogunate judicial rules and in the local customs, the idea of collateral security had developed much faster for the hypothec than for the pledge;⁷ and the extent of this recognition may be judged from

¹ VI, c. IV, § 1, MS.

² Here, too, as in the ordinary pledge, appears the same necessity for curing the defect of title by special quitclaim clause or deed; thus (II, 111, Higo): "It is a regular stipulation in instruments of hypothec that the debtor shall make no objection if on default at the end of the term the creditor assumes possession of the property"; (II, 103, Echigo): "In case of default the land becomes forfeit, and an instrument of forfeiture is delivered to the creditor by the debtor, the former thus obtaining complete and perfect ownership of the land"; so also II, 93, Owari. The legal cut-off, after a certain period, is also found: II, 106.

³ II, 100, Shimotsuke; 101, Rikuzen; 103, Echigo; 106, Aki; 111, Satsuma.

⁴ II, 93, Ise; 100, Iwaki, Iwashiro; 102, Echizen, Echu; 104, Tango (where it is said that either forfeiture or sale takes place according to agreement, i. e. an intervening stage of development); 106, Suwo; 107, Kii; 108, Iyo.

⁵ II, 107, Kii.

⁶ As late as 1729, in house hypothec at least (VI, c. IV, § 1, MS.), the *res* was forfeited on default, and no account rendered; but in subsequent regulations (ib., § 3) there is to be no forfeiture in the hypothec. The theory of the transaction is well shown by a lengthy controversy over the question whether the hypothec-*res* of an absconding bankrupt (a criminal) could be confiscated to the State as the defaulter's property, or whether the pledgee could claim it as forfeited; in 1751, and later, it is confiscated, on the former theory (ib., § 1), sold, and the government-fine and taxes paid out of the proceeds, the pledgee getting his claim out of the remainder so far as sufficient (ib., dated 1840); though the special custom of Osaka was there allowed to prevail, by which the *res* was handed over to the pledgee on the theory that it was his, not the pledgor's (ib., § 1, as late as 1837).

⁷ It is for this reason that we find much said in the precedents about the pledge with re-lease (VI, c. IV, § 1, 2, MS.). When pledgees found that the forfeit-idea was disappearing, to their disadvantage, in the *kakiire-shichi*, they began to attain their purpose by taking an ordinary *shichi* and then giving a lease (*kosaku*) back, leaving the pledgor in possession; this was sanctioned. Then they merely put a lease-clause in the origi-

the circumstance that in some provinces the hypothec was the only form used.¹

The significant rule that there could not be a second hypothec on the same *res* seems to have been everywhere in force.²

III. Sale for re-purchase.³ The primitive and peculiar function of this transaction, as already explained for Germanic law, seems to have been the preservation of the chance to regain family-property sold in time of need to those who were not disposed to exact harsh terms of forfeiture. The evidence for this view is to be found rather in the traits of the community than in the documents, and one can only refer to the general flavor of the customs for the source of the impression.⁴ Ordinary lenders, however, would not here resort much to the sale for re-purchase for the purpose of securing an immediate cut-off on default, for the simple reason that they could still usually attain that end, in the stage in which the law comes to us, by the forfeiture-clause in a genuine pledge.⁵

nal pledge-deed; this was at first treated as void, and the transaction as *kakiire*; but later (perhaps till 1840) it was allowed as valid and effective to prevent the *res* from being treated as *kakiire*.

¹ II, 94, Mikawa; 93, Ise; 97, Omi; 100, Iwaki; 102, Oshima; 111, Iki, Hyuga. Moreover, as in Germanic history, the hypothec alone is found, in some districts, in towns: II, 108, and elsewhere.

² II, 4, Omi, Iwashiro, Rikuchu; 6, Echigo, Kii, Iyo; 7, Tsushima; 103, Echigo; 109, Bugo; VI, c. IV, § 3, MS.; Simmons, 192, Kyoto. The hypothec by deposit of title-deeds was not uncommon: II, 3, 95, and elsewhere.

³ The terms were: *Nenki-uri* (term-of-years sale); *kane-ari nenki uriwa* (sale with return if I have money within the term); *ariai-uri* (happen-to-have-[money] sale); *kommono-kayeshi* (original-*res* return).

⁴ II, c. I, II, VI, VIII. One passage (II, 20) mentions, as a peculiar variety of sale, the "sale of patrimony" (*mei-seki-uri*), "usually made by a seller who wishes to procure a further advance." One strong piece of evidence, however, is the fact that there was allowed (as in Scandinavia) an unlimited period for thus buying back, at an era when the above-described limit of ten years was in full force for cutting off the redemption of a genuine pledge: II, 5, Echizen; 18, Ise ("no matter how many years pass by"); 30, Uzen ("perpetual privilege"); 109, Buzen; 20, Mikawa ("even though many tens of years elapse before he claims it"); yet custom fixes 61 years as the limit; 107, Awa ("several tens of years").

⁵ They did, however, employ it for that purpose in certain regions; for in the hypothec, as above pointed out, the lender must (in this century certainly) restore the surplus, while in the pledge with possession he usually need not; thus the lender would avoid the hypothec, and take a sale on a short term of re-purchase, in a region where the hypothec had become the only form of pledge; and so in many regions we find it recorded that "pledge goes by the name of 'sale for a term of years'": (II, 109, Buzen, Hizen, Bugo; 111, Iki; 102, Echizen, Kaga; 103, Echigo; 104, Hoki; 107, Kii, Awa; in some places, it is interesting to note, the resale-agreement was in a

IV. The pledgee appears originally as taking all the profits of the land in his possession without accounting; while the hypothec appears as accompanied by ordinary money-interest only.¹ About 1736 the Shogunate officials seem to have required an accounting for the surplus over the legal rate of 15%, leaving the deficit to be at the pledgee's risk;² but the customs above cited indicate that this rule was but little enforced. It is enough to note, however, that the transaction is always a type of *shichi*, and not a transfer of the use of the land or any other different institution; we are merely dealing, as in Germanic law, with one of the features of the law's attempts to prevent undue profits by the pledgee;³ and the coincidence of the late persistence of his non-responsibility alike for surplus capital and for surplus fruits indicates the connection of the two matters.

4. CHALDEAN LAW.⁴

We know that the Chaldean civilization was a mercantile one, and that commerce was highly developed; and yet all this is con-

separate document, as in Lombardy: II, 103, Echigo; 104, Hoki). It does not appear that the law had reached the stage in which this evasion was struck at by the authorities.

There was also a contrary mode of evasion, i. e. a resort to the pledge-form for the purpose of evading the prohibition of perpetual alienation which for economic reasons was attempted by some of the feudal lords; it was the very forfeiture-feature of the pledge which enabled the buyer to attain his purpose equally well by a short-term pledge: II, 25, 26, 27, 28, 30, 33, 39, 40, 42, 110. So in France, we shall see the pledge used to evade the feudal fee due from every sale. Both these cases it is well to note, for they warn us to search for the reasons for a certain form, and they show how a form undesirable for one purpose may under certain conditions become desirable for another purpose.

¹ II, 92, 95, 96, 97, 98, 104, 105, 106, 107, 108, 110, 111. Thus, in Iwami (105): "The creditor [in pledges] takes possession of the land and obtains a profit by cultivating it himself, so that no interest is paid; at the end of the term the debtor may redeem by paying the principal. In hypothecs, the ownership remains in the debtor, so that the interest is to be paid in money, and on redemption both principal and interest are paid."

² VI, c. IV, § 2, MS.; for the legal rate, see III, 298.

³ Yet in other ways the attainment of undue profits was struck at; thus, by 1779, the practice of leasing back one half the land to the pledgor while having him bear the whole of the taxes (known as *san-chi*), and of leasing back all the land and having him pay part or all of the taxes (known as *hanrai-no*), were forbidden (VI, c. II, § 2, MS.); and these are mentioned as forbidden in the customs of the Restoration (II, 99).

⁴ Different features of development are represented with different fulness in different systems of law. In the Chaldean system we find only a few points represented in the sources hitherto accessible, and these are such as befit primitive stages of the law. The sources are here exclusively documents (as we should call them), and only

sistent with a relatively primitive set of ideas. A few marks of these may be observed. The generic term, in the first place, for pledge and hypothec, was the same, — *maskanu*.¹ Furthermore, the *res* is always said to be “in place of” (*kuum*) the thing owed.² The form of the hypothec³ is that of a suspended pledge: “If the

by comparison of these can a few generalizations be reached. References are as follows: —

1877, Documents juridiques de l'Assyrie et de la Chaldée, Oppert et Menant (“Chaldea” will here be used as including Chaldea-Babylon, and the later Assyria-Nineveh); 1893, Beiträge zum babylonischen Privatrecht, Meissner; 1896, Sammlung v. Ass. u. Bab. Texte, B. IV, Texte jurist. u. gesch. Inhalts, Peiser; 1886, Les Obligations en droit égyptien, Eugène Révillout; Appendix (paged continuously), Le droit de la Chaldée, Victor Révillout. The last work is the most useful, because it contains the greater part of the pertinent documents. The reference here will be to “R.,” followed by the page, and by the number of the original document (as cited by M. Victor Révillout), from M. Strassmeyer's edition (untranslated) of the British Museum collection; where no number is added, the document is usually an unpublished one of the Louvre. The comments of the learned brothers Révillout are unfortunately here of no service, as they have not studied the documents from the present point of view. Moreover, their work is of very different value; for the first above mentioned neglects usually to cite the source of the original text, and gives most of his space to adulation of the Egyptian law and speculation as to its influence upon the Greek and Roman law. The work of Oppert and Menant is to some extent untrustworthy; e. g. it translates *hubulli* as *pignus*, while the word certainly means only “interest.” Meissner has only a few pledge-documents. There are other translated collections, but they seem to have nothing useful.

Nothing will here be attempted for the law of Egypt; for, in spite of the greater abundance of general material for the student of institutions, the published pledge-documents are as yet few.

¹ See the documents in Révillout, *infra*; Peiser, 176, 184, 202, 218, 223. Oppert and Menant, in a Chaldean phrase-book, wrongly translate *hubulli* as *pignus* (20, 22); their *mansaranu* (14, 22) is evidently an erroneous decipherment of *maskanu*; another word, *buki* (35, 138), probably means “loan,” and their rendering seems unsafe.

² As almost every document in Révillout shows.

³ The phrase *ina pani* (“à sa face”) seems to indicate possession, and when said of the creditor, his possession, i. e. a pledge proper: R. 429, No. 176; 452; 366, No. 75; 435, No. 26 (“until the creditor receives the money, . . . the house shall be *ina pani*”); 436, No. 156; 452; 508, No. 36; 509, No. 135. For the hypothec, *insagil* or *tusagil*, “confide,” sometimes occurs with *kuum*: R. 345, No. 154; 347, No. 55. That *kuum* was equally used for hypothec and pledge proper appears from its use with, e. g. the hypothec for a wife's *dos*: R. 345, No. 154. — The distinctive mark of the pledge proper seems to be the clause: “There is no rent for the house, and no interest on the money,” which assumes the pledgor to be using the money and the pledgee to be using the house; it occurs as follows: R. 435, No. 26; 440, No. 114; 454, No. 16; 504, No. 26; 507, No. 59; 509, No. 135; 510, No. 68; 514, No. 114; Peiser, 203, 223. On the other hand, the hypothec is characterized by a clause forbidding a second hypothec: “No other possessor shall put his hand on the *res* till the creditor receives his money.” This phrase cannot apply to the pledgee's possession (i. e. forbidding him to alienate), because, as we shall see, the pledgee could transfer

money is not paid at . . . then the house which the debtor lives in shall be the pledge of the creditor till payment"; or, "if, etc., then the slaves are to be delivered to the creditor in full payment, in place of (*kuum*) 50 mina of silver."¹ Again, the general hypothec ("all that he possesses, both in town and country"), which was in frequent use,² the generic phrase being the same, seems to have been commonest for purely contingent claims.³ The characteristic prohibition of a second hypothec also appears;⁴ and the peculiar expedient thus required in obtaining a second loan (to be noted later in Greece) is in common use.⁵ We have practically no evidence as to the risk of deterioration and the duty to restore a surplus; but it is difficult to believe that there was any duty of either sort.⁶ Moreover, though the ordinary deed of sale or exchange regularly contained a quitclaim or *auflassung* clause,⁷ it seems totally lacking in the pledge,—strongly indicating, since the tool (as used in other communities) for cutting off the redemption-right and surplus-duty was at hand and known to them, that their failure to use it must have been because the rules of pledge did not

freely. It may be asserted to be the distinctive earmark of the hypothec, and is found as follows: R. 524, No. 158; 430, No. 90; 445, No. 2; 454, No. 16; 455; 521, No. 90; 528; 519, No. 118; 519. In four documents it also occurs with the above described "rent-interest" clause; but in two of these (R. 512, No. 22; 514, No. 167) it is clear that one *res* was given in pledge, and the other in hypothec (or a general hypothec) for the rest of the debt or additional security, so that both the clauses would appear in the document; in the third document (508, No. 36) a gap exists, which probably contained a general hypothec; in the fourth (527), no explanation of the discrepancy suggests itself. In Peiser, 218, the clause occurs (as often above) in a general hypothec.

¹ R. 524, No. 158; 528.

² Examples in R. 430, No. 90; 436, No. 156; 445, No. 2; 450, No. 95; 454, No. 16; 521, No. 90; 519, No. 118; Meissner, 9; Peiser, 218.

³ M. Révillout speaks of it as often used for sureties and joint obligors (521); and his documents show it in use for the wife's *dos*, e. g. 345, No. 154.

⁴ Note 3, p. 413, *supra*.

⁵ Thus (R. 439, No. 114), one who has given a house in pledge for 3 minas has a new lender advance him another mina on the same house; but in order to accomplish it, the second lender gives the pledgor the amount of both loans; the latter pays off the first lender, who then transfers the house to the second lender; so also R. 366, No. 75. That credits and pledges were freely transferable, see R. 45.

⁶ E. g. one document for a debt of 34 *cor* of dates and 13 shekels of silver pledges a slave, to be on default the "entire equivalent" of these sums; and in all the documents of Révillout there is no mention of restoring a surplus or exacting a deficit. In Peiser, 218, a clause provides that the crop is to be sold, and the debt paid out of them; but this is a solitary instance, and the original text may not mean quite as much.

⁷ R. 11; 423, No. 170. There was not a literal quitclaim; the seller promised *if* he reclaimed to pay ten times the price; and the purpose was to bar his claim.

yet force a resort to it. Nor was there, apparently, any accounting for the profits.

5. SLAVIC LAW.¹

From etymology and the use of the pledge-terms we get nothing. It is clear, however, that the forfeit-idea prevailed, in the late mediæval law, as against the pledgee,—i. e. if the *res* perished, he recovered nothing from the pledgor;² and the transition-stage of an agreement to the contrary is represented.³ The pledgee's duty to restore the surplus has been reached⁴ (here, as in Germanic law, preceding the pledgor's deficit-liability), though the stage of absolute forfeiture had clearly preceded.⁵ There was originally an unlimited right of redemption, even after a default and an ensuing sale by the pledgee to a third person;⁶ but by agreement this right could be cut off.⁷ Collaterally with this, however (as in Germanic law) seems to have existed a legal proceeding for the cut-off; for in the Baltic provinces the pledgee sells after judicial permission;⁸ and by means of this machinery, at a later time, the clause of forfeiture (and also the evasion by sale-for-repurchase) is struck at,⁹ but the data are too confused to suggest anything definite. The pledgee appears in the beginning as not accounting for the fruits of reality;¹⁰ whether the later stage was reached does not appear.

6. MOHAMMEDAN LAW.¹¹

The risk was on the pledgee, in the Hanefite system, but in that later stage in which its loss leaves the pledgee remediless up to the

¹ The wealth of the sources, in comparison with the available data, is enormous; for besides the Southern non-Russian Slavs, and the as yet purely customary law of many Russian tribes, there are four distinct groups of law in which early custom and modern legislation may be traced in a continuous stream,—Russia proper, Poland, the Baltic provinces (Lithuania, etc.), and Finland.

References: 1835, Maciejowski, *Slavische Rechtsgeschichte*, tr. by Buss, 1st ed.; 1877, Lehr, *Éléments du droit civil russe*.

² M., § 272; Lehr, 336, 345, 382; if a pledged animal died, the pledgor need pay only one half, and the pledgee exonerated himself by returning the skin: L., 329.

³ L., 336, 382.

⁴ Ib.

⁵ M., § 272.

⁶ Ib.

⁷ Ib.

⁸ L., 382.

⁹ L., 330, 382; M., § 272.

¹⁰ L., 382.

¹¹ The same paucity of translated sources here hampers us, though there are four great bodies of Mohammedan customs still in force,—the Hanefite in Turkey, the Malekite in North Africa, the Shafite in the East Indies, and the Imamite in Persia and Northern India,—each with its Coke upon Littleton and many lesser commentators. The first three are sects of Sunnite, the last of the Shiite, branches, which divide the followers of Mohammed.

References: 1875, Baillie, *Digest of Moohummedan Law*, Part I (Futawa Alum-

value of the *res* only;¹ while in the other three systems the loss of the *res* leaves the debt still existing.² There is no direct evidence as to a duty of surplus-restoration; but the pledgee's title did not become absolute *per se* on default, and we find that a judicial order was necessary to make a sale by him valid,³ and also that the forfeiture-clause and the sale-for-repurchase (*bye-al-wufa*) was well known as an expedient for evading this necessity;⁴ so that we can scarcely doubt that it was used to evade the surplus-restoration, at least in those systems in which the pledgor was liable for a deficit, and especially as we do there hear of a prohibition of the forfeiture-clause.⁵ The hypothec was employed, the same generic term being used;⁶ and a second hypothec was unlawful.⁷ The matter of the pledgee's accounting for profits is confused by the strict prohibition (similar to that in Jewish law) of interest of any kind; and no clear indications appear.⁸

7. HINDU LAW.⁹

A few significant features are ascertainable. (1) There are many passages in the Sutras discussing the loss of the *res* as affecting

geeree); 1885, Kohler, Zeitsch. f. vergl. Rechtsw., VI, 208, Islamitische Obligationen- und Pfandreht; 1860, Tornaauw, Le Droit Musulman; 1886, Nauphal, Cours du Droit Musulman, Part I; 1882, Van den Berg, Minhâdj At-Tâlibîn.

¹ Kohler, 222; but Baillie (807) and Tornaauw (172) speak of the risk as unqualified.

² Van den Berg, I, 431; Kohler, 222.

³ Kohler, 226; Tornaauw, 172; Van den Berg, I, 431; they do not agree in the precise mode of stating this.

⁴ Baillie, 807; Kohler, 227; Tornaauw, 172.

⁵ Van den Berg, I, 431.

⁶ Tornaauw, 129. Kohler, 227, thinks it does not exist; but Tornaauw particularly repudiates this fallacy. The form of a lease back to the pledgor was also known: Tornaauw, 170; Van den Berg, I, 431.

⁷ Van den Berg, ib.; Kohler, 227; Tornaauw, 175, *semble*.

⁸ See Kohler, 225.

⁹ The Hindu sources are chiefly one Sutra (Vishnu) or book of the law, and five Sâstras, or commentaries on Sutras; the references are to the following editions: Vishnu, Jolly, in Sacred Books of the East, vol. VII; Gautama, Bühler, ib., vol. II; Manu, Bühler, ib., vol. XXV; Narada, Jolly, ib., vol. XXIII; Brihaspati, id., ib.; Yajñavalkya, Roer and Montrion, 1859; the first two represent 100-300 A.D., the others 500-600 A.D. There are also a few translated commentaries (usually mere collections of earlier passages from the above different schools) of early modern times: 1863, Vivada Chintan-rani, tr. by Vachaspati Misra (1420 *circa*); 1865, Vyvahara Mayukha, tr. by Nilakamtha Bhatta (1400-1600). The drawbacks in this field are: (1) the sources are almost exclusively brief passages from the primitive books, with no comments or documents; (2) the translators seldom furnish the technical words of the vernacular, so that no testing of their work or independent judgment is possible; (3) the curt and obscure terms of the vernacular often make the translation a mere choice of hypotheses, and

the pledgee's right to claim the debt; ¹ and though no one passage distinctly exhibits the primitive rule, ² they all evidently represent a state of opinion which is just getting away from it and feeling the necessity of disposing of it. (2) A second hypothec is not permitted. ³ (3) The pledge with creditor's use is open to unlimited redemption; but the deposit-pledge is forfeited when the accrued and unpaid interest equals the principal, or when at maturity of the term, if there is one, a default occurs; ⁴ and there is a proceeding for forfeiture, like the Germanic one, consisting of a summons to the pledgor, ⁵ while in the same text the very next section but one, evidently interpolated, ⁶ provides in such a case for a sale or appraisal and the handing over of the surplus to the pledgor. (4) The pledgee, in some Sutras, does not account for profits except by express agreement, ⁷ while in another the profits *per se*, when they have paid off double the principal, redeem the *res*. ⁸

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(To be continued.)

the modern scholars, not looking at it from the legal point of view, may choose an inferior hypothesis; thus, in Manu, VIII, 145, the statement that a pledge cannot be forfeited by lapse of time should probably read, as a collation of passages shows, "a pledge cannot be acquired in ownership by adverse possession," — a principle often enunciated in other systems; and numerous other examples may be cited.

¹ Gautama, XII, 42; Vishnu, VI, 6; Narada, I, 126; Brihaspati, XI, 19, 20, 21; Yajnavalkya, II, 59. Moreover, the rule which indicates the first step towards a deficit-liability of the pledgor — that if the *res* perishes or deteriorates he must replace it — is to be found: Narada, I, 130; Vyavahara, c. V. s. 2, 1; Yajnavalkya, II, 60.

² Singularly enough, one mediæval commentary expressly says: "If pledged cows, etc. be accidentally destroyed, the principal shall be lost; this is according to the practice among persons of good manners": Vivada, c. 1.

³ Vishnu, V, 181; Vyavahara, c. V, s. 1, 1: "As long as I fail to clear off thy debt, so long will I not alienate either in gift, sale, pledge, or any other mode, this house, field, or other thing."

⁴ Yajnavalkya, II, 58; Brihaspati, XI, 25-27.

⁵ Brihaspati, ib.

⁶ As the editor suggests.

⁷ Vishnu, VI, 8; Brihaspati, XI, 23, 24.

⁸ Yajnavalkya, II, 64; so for movables: Vishnu, VI, 7.

Hindu law of the classical period (before 600 A.D.) is of course to be distinguished from the modern customs of the living Indian peoples, largely non-Aryan. Their customs, however, contain much valuable evidence; for instance, in no community are two features of the primitive pledge, indefinite right of redemption and pledgor's non-responsibility for the original debt, better shown (Tupper, Punjab Customary Law, III, 217).

A MOVEMENT IN ENGLISH LEGAL EDUCATION.

ENGLISH law is the parent of the law of this country, almost as much as English speech is the foundation of our speech. After one hundred and twenty years of separate government our laws and our language still acknowledge, not British dominion, but the potent influence of usage and systems kindred with our own, prevailing and developing among a people bound more closely to ours than any other, by the ties of the past and of the future, by sentiment and origin no less than by material interests. We have, as a nation, adhered strongly to the English type of law even in statutes and codes. We have felt an unswerving attachment to the jury system, and to trial in criminal cases before a judge who sits as an "impartial umpire" between the State and the accused. We have never sympathized with the continental method of prosecution which Sir James Fitz James Stephen called "inquisitorial," as compared with the English "litigious" system. Numbers of our earliest lawyers studied in the English Inns of Court. Edward Tilghman, Edward Shippen, Benjamin Chew, and William Rawle had studied in the Middle Temple, and Andrew Hamilton is believed to have studied in Gray's Inn. The bar of this country must trace its "apostolic succession," like the historical churches, through English channels. In considering legal education in England we consider a training which very directly affects us, and which our methods have in late years largely influenced. An English decision is as much an authority before our State courts as a decision from a sister Commonwealth within the republic, and our Federal courts give even greater heed to it. The training which forms the bench and bar of England, therefore, is of more than speculative interest to us. Moreover, a man serves his home best who seeks to bring to it all that is best in the rest of the world, and a constant observation upon the progress of other nations is a test and condition of advancement in our own. We will say, with Sir Frederick Pollock, "*Benedictus qui venit in nomine Legum Angliæ.*"

We are not disposed, however, to recount the old story of how an unsuccessful barrister, in the middle of the last century, began at

Oxford a course of lectures on English law, not for law students, but for country gentlemen and general scholars, which attracted at once the attention of King and people, brought their author sudden rank, fame, and fortune, and when published as Blackstone's Commentaries became as much the accepted compendium of law in this country as in their own. Nor are we here to discuss the picturesque anachronisms of the Inns of Court, to tell how an official was wont to call the students in Norman French to the daily feasting, or of the social license and legal and political conservatism of these ancient and inscrutable bodies.

Venerable semi-monastic foundations as they are, they have the traditions of having been great schools of law with learned moots and wrangles, and they have had readers, so called, who gave readings on the law in their solemn halls. They alone have for centuries had the power to call to the bar, and they still maintain that uncontrolled authority.

But, if we may trust Mr. Montagu Crackanthorpe, who is by every one quoted as the best authority on legal education in England, in his testimony given in 1892 before the Gresham Commission, although it had been a moral duty, if not a legal duty, on the part of all of the Inns, and a legal duty on the part of the two greater ones, the Middle and the Inner Temples, to educate law students, at least from the time of the charter of James I., yet nothing except the delivery of a few sporadic lectures was done until 1832.

At a meeting of the Hardwicke Society in the Inner Temple Lecture Hall, December 4, 1896, Mr. C. Cavanagh quoted the Letters Patent under which the Middle and Inner Temple acquired most of their property, issued the 13th of August in the sixth year of James I. unto Sir Julius Cæsar, then Chancellor and Under Treasurer of the King's Exchequer, and others, granting them the mansions with the gardens and appurtenances therein described "for lodgings, reception, and education of the professors and students of the laws of this realm." And Mr. Cavanagh declared, "This beyond all question is a trust."

The solicitors had been as free of the Inns of Court as the barristers until about the middle of the sixteenth century, when they were banished and left without any share therein. So about the beginning of this century they were absolutely destitute of any means of legal education except as they picked it up in the office of older attorneys. A stir was made about this, after many years

of dissatisfaction, in 1832, and certain private persons formed a society, got property in Chancery Lane, and obtained a charter as "The Council of the Incorporated Law Society." The new association established lectures and classes for the more adequate education of law students desirous of becoming solicitors. This excited the emulation of the Inns of Court, which had charge of the education of the higher branch of the profession, and they, with reviving zeal, appointed professors and readers in certain topics for the would-be barristers.

"Up to that time I suppose no education at all was required?" said Lord Cowper, the chairman of the commission. "None whatever," replied Mr. Crackanthorpe. "There was no sort of lectures which could be attended, and at which the attendance could be certified; in point of fact all that was required was that a man should be a respectable person, pay his fees, and express a wish that he should be called to the bar." Mr. Anstie: "That would be to what date?" Mr. Crackanthorpe replied: "The first compulsory examination was not till 1859, and that was only a preliminary compulsory examination for admission to an Inn of Court. The first compulsory final examination for call to the bar was not till 1872."

It should be remarked that no Inn can call a person to the bar until he has been a member of that society five years, except that certain degrees from the greater English and Irish Universities shorten the period, and there are certain exceptions as to solicitors.

Sergeant Robbins, in his published reminiscences called "The Bench and Bar," says he entered the Middle Temple as a student in 1833, and the examination lasted about a minute and a half, and consisted of one or two questions in Latin or general literature, put in the perfunctory style in which one asks a passing acquaintance after his health. Writing in 1869, he says he never knew any applicant plucked on this examination. He says, after paying £100 fees and giving security for keeping the rules of the Inn, you had merely to keep twelve terms; that a term was three or four weeks, and in the middle was what was called grand week. To keep the term you must dine once in grand week and once in each half week at the Inn. Students literally were required merely to eat their way to the bar.

Each Inn acted separately in matters of legal education until a Parliamentary committee investigated this in 1846, and reported

that it would be well that the Inns should co-operate and establish a joint system of education. For the first time in their history, as far as known, alarmed at the report, they appointed a joint committee, which reported that the four Inns should act in concert "in the joint establishment and maintenance of a uniform system of legal education of students before admission to the bar." They also provided for a standing committee of eight benchers on legal education, and Sir Richard Bethel, afterwards Lord Chancellor Westbury, called the boldest judge who ever sat on the bench, was made its chairman.

In 1855 the Inns of Court were investigated further by a Royal Commission, which reported rather in favor of their incorporation, a threat which seems always full of terrors for them. This produced a great effect. The Inns appointed a committee, which sat four years, and finally adopted the suggestion of the Royal Commission and reported that it was expedient that there should be a compulsory examination of students previous to being called to the bar. In that year the Inns first made an examination for admission to begin studying compulsory, requiring, as is still the rule, students to be examined in the English and Latin languages and English history; but not until fourteen years later would they adopt the recommendation of their own committee, that there be a compulsory examination for call to the bar.

Finally, a legal education association was organized, July 6th, 1870, and Sir Roundel Palmer was made its first president. He and his allies sought for a great teaching faculty of law, whose instruction should be open to all who desired to know the law of the land, whether intending to become lawyers or not. The whole movement was brought on by an able paper from Mr. Jevons, of Liverpool, pointing out the shameful neglect of legal education in England, and this one man won the interest of Sir Roundel and a great number of the more enlightened lawyers. The plans were strongly opposed. A majority of the council of the Incorporated Law Society (the solicitors' organization) hesitated to give their adherence to a scheme for education in law open to all alike, but a minority of the council gave the plan their warm support, and, appealing to the general meeting of the society, that body, after a debate of two days, by a majority of two to one, supported Sir Roundel's enlightened and liberal project. His association met with a committee of the Inns for conference, and they promptly disagreed. Thereupon, July 11,

1871, Sir Roundel, undeterred by the frowning benchers, and seconded by Mr. Osborne Morgan, gallantly moved in the House of Commons "That in the opinion of this House it is desirable that a general school of law should be established in the metropolis, in the government of which the different bodies of the legal profession in England may be suitably represented, and that after the establishment thereof no person should be admitted to practice in any branch of the legal profession without a certificate of proficiency in the study of the law, granted after proper examination by such general school of law." It went no further during that session, but the society printed and circulated reasons in its favor.

February 1, 1872, a deputation appointed by the executive committee of the society waited upon Mr. Gladstone, then Prime Minister, to ask government support for the measure. The deputation was headed by Sir Roundel Palmer, and included Sir Edward Ryan, Vice Chancellor Wickens, Mr. Justice Quain, Lord Hobhouse, Mr. Justice Mathews, Baron Pollock, Sir Henry Maine, Professor Abdy, Professor Bryce, and others; but Mr. Gladstone, though expressing his sense of its importance, doubted whether the pledges of the government already made would enable them to spare the time requisite for inquiry which must be made before they could commit themselves to any decided course of action. A most characteristic reply from the "old Parliamentary hand."

However, on March 1, Sir Roundel again moved his resolution, slightly modified so as to include in the advantages of the proposed school of law, not only persons intending to practise in any branch of the legal profession, but as well "all other subjects of Her Majesty who may resort thereto." Petitions in its support were presented signed by about 400 members of the bar, 18 of them Queen's Counsel and benchers of the Inns, and by about 7,000 out of the 10,000 solicitors then practising. Members of the government complimented Sir Roundel for his zeal, but wished to hear from the Inns of Court. Mr. Gladstone said he had fully mortgaged the time of the House, and intimated that the government could not give its support. Sir Roundel determined to take the sense of the House notwithstanding, and got 103 votes for his motion, but it was rejected by a majority of 13, the government voting against it in a body.

Death and promotion are equally fatal to reformers. Sir Roundel almost immediately thereafter was raised to the Woolsack, becoming Lord Chancellor under the title of Lord Selborne, and was

thus compelled to resign his presidency. Mr. Amphlett, Q. C., was chosen in succession, and he too was taken from the society by elevation to the bench. Mr. Justice Quain died, and the organization lost its vitality and ceased to hold meetings.

Lord Selborne, having on a change of ministry retired from the Chancellorship, two years later returned to the charge with a bill for incorporating the Inns of Court and establishing a general school of law. The bill went to a second reading and was withdrawn. The success of a reformer does not so often consist in carrying his particular bill or resolution, as in compelling or inducing even the enemies of reform to come to its standards.

The Inns, after long opposition, had come, as we have seen, in 1872, to require examination for call to the bar.

Mr. Crackanthorpe was asked whether, after enforced examinations, there were any differences in the ability of those who came to the bar, and frankly replied, "I cannot say that there were. Ability comes to the top at the bar in very curious ways, and it is impossible often to say why a man succeeds at the bar." He was of the opinion, however, that the examinations had an effect in keeping out grossly ignorant people.

There was a lull in the agitation for better legal education until 1891. Then Lord Justice Lindley and Mr. Justice Mathews, of the Council of Legal Education, interested themselves in effecting a reform within the Inns, by which the Inns appointed an increased number of readers, or professors and assistants. Instead of five professors at £1,000 a year, there were six full professors at £500 and four assistant readers at £350 a year.

The readers were elected for terms of three years, and were often re-elected. They were many of them eminent persons, having other employment, as Professor Bryce, Mr. Frederick Harrison, and Sir Frederick Pollock. Attendance of students at the lectures is not compulsory, but it aids to pass the examinations and to fit for practice, and is therefore desirable.

Mr. Crackanthorpe reported that at the previous term 92 students applied to pass; 57 were passed, and 35 rejected. Nothing is asked in the examinations that is not taught at the lectures. Many of the students are attending in barristers' chambers, at the same time paying a hundred guineas for a year's course there. They attend lectures and classes about two hours a day. No one is allowed to attend except he is a member of an Inn of Court, and thus those who seek a knowledge of law as a part of a liberal edu-

cation, and not for professional purposes, are in the main unjustly excluded. Even a solicitor who wishes to take the lectures with a view to becoming a barrister was excluded, as not a member of any Inn of Court.

In considering the education of the solicitors, we must briefly trace the history of the incorporated Law Society already mentioned. It is a great association of solicitors for mutual benefit, incorporated in 1831. In 1836 they began to examine candidates for admission as solicitors. This power to examine and admit was in the judges, but they used the society to aid them. In 1877, however, by act of Parliament, power was given the society to examine for itself, and now, with the assistance of a Master of the Supreme Court, it has entire control. If the society refuses a certificate to any candidate, he may appeal to the Master of the Rolls. There are four examinations. First, a preliminary one in general knowledge, including Latin and two foreign languages. These are held at various points about the country, and are substantially equivalent to an entrance examination, or "little go," at the Universities,—rather more than equal was the testimony. Various university degrees exempt the candidate from this preliminary. Secondly, there is an intermediate examination in an assigned part of Stephen's Commentaries. Thirdly, a final examination as a test of practical skill, not from books, but upon law generally. Fourthly, on the day but one after the finals, examinations for honors are held, which are entirely voluntary. Roughly speaking, about two thirds of the applicants pass the preliminary and the rest are postponed; about four fifths pass the intermediate; as Mr. Pennington, the president of the society, testified, "an articulated clerk, with any reasonable amount of attention, ought to be able to pass that examination." And the finals, which are the most important, are passed again by about two thirds of those who come up to them, so that, of a given lot starting together, only about one third get through and win the certificates for admission in course.

Up to October, 1891, the society maintained a system of lectures and classes for students going up for their finals. The attendance on these declined so far that at last there were only thirteen subscribers for this course, and it was abandoned at the time mentioned.

It was found that the students preferred privately to hire and depend upon tutors or coaches who gave private instruction, and the society concluded to furnish as near as might be the same form

of assistance. These tutors seem really to be lecturers, not unlike our own; but instead of giving in the English manner a brief course, and then abandoning the student for months, they give far more continuous and systematic instruction.

The lecturers were highly capable, and often distinguished men; but, as Mr. Pennington said, a tutor taking a student in hand for three years could give much more assistance than a lecturer who sees a man for a few weeks at various intervals during the year.

Tuition begins with a year's instruction, which may be by correspondence, consisting of twenty-four fortnightly letters. The students are required to serve five years as articled clerks, but a university degree reduces the time to three years. Most such clerks begin at seventeen years of age, and are admitted at twenty-two. The articled clerks serve in solicitors' offices from ten A. M. to six P. M. commonly, with a short interval for lunch, and they pay a premium of from three to five hundred guineas each to the solicitor with whom they are articled.

I have no later figures; but in 1892 Mr. Longbourne, formerly one of the Secretaries of the Legal Education Association, testified that there were about 15,000 solicitors practising in England and Wales, nearly 7,000 of them in London. There were about 3,000 of these articled clerks, and during the preceding year 639 students passed their final examinations and joined the ranks of the solicitors. Evidently the instruction afforded by the new method of the Incorporated Law Society does not do away with the need of private tutoring, for certain London solicitors fill a page of the *London Law Times* with the advertisement of the advantages which they afford to students seeking to become solicitors, and append lists showing that for a series of years many, and during the last year substantially all, of the considerable honors and prizes of the examinations have been won by their students.

The project of Lord Selborne was in a measure revived in connection with the Royal Commission, headed by Earl Cowper, appointed to consider the framing of a charter for the proposed Gresham University in London which should unite and co-ordinate all great interests and functions having to do with higher education in England in one all-inclusive university teaching every branch of human learning. The commission took the testimony of many eminent persons — lawyers, teachers, and judges — on the subject of legal education in England, and on the continent of Europe and in this country. The French and German schools were com-

mended for the teaching of administrative law and of political science; but the most unqualified praise seems reserved for the Law Schools of this country in the matter of preparation for the bar. The Right Honorable James Bryce testified that the plan of systematic teaching of law has proved so successful in the United States that he advocates it positively in England.

Mr. Dicey, Vinerian Professor at Oxford and Queen's Counsel, testified that "the Law Schools in America possess a reputation which is unlike anything which is possessed by any law school here."

Sir Frederick Pollock, Corpus Christi Professor of Jurisprudence at Oxford, declared that "the American Law Schools have convinced the profession there that they do teach law in an efficient way,—in a way which makes a man not only a better instructed lawyer, but a better practical lawyer." There was no dissent moreover from this concurring commendation of our Law Schools.

Finally, the Commission, after two years of investigation and reflection, reported, in 1894, "that the time has now arrived when a more complete system of legal education may be and ought to be established in London, that this is only possible with the concurrence of the Inns of Court, that on reasonable conditions the Inns of Court are likely to co-operate and to open their lectures to the public, reserving to themselves the entire control over the call to the bar, but being ready to accept as a test of theoretical knowledge the degree or certificate of the University." The Commission therefore propose that the Inns of Court be represented on the governing body of the University. Also that the Incorporated Law Society be represented on the same body. It also recommends that the Law Faculty be constituted with a view to persons studying for either branch of the profession of the law in Great Britain, India, or the Colonies, and equally for persons engaging in the public service, civil or diplomatic, also for persons engaged or about to engage in public life in the administration of public law as members of Parliament, magistrates, etc. Also for persons applying themselves to work of investigation or research in any of the subjects of the faculty. This noble and comprehensive plan, as nearly as can be learned, is being carried forward by the slow and cautious methods which our "kin beyond sea" always prefer.

It is privately anticipated that Mr. Crackanthorpe will be called on to aid in shaping the final action which will insure to England

a more adequate and a more free and open system of legal education. The Commission have outlined a course of legal studies deemed desirable, and prepared a statutory commission for carrying out the scheme submitted. It is believed that Mr. Crackanthorpe will be invited to serve on this commission.

In the mean time the Inns of Court keep on their slightly modernized methods, and the only path to the bar is through their doors. November 17th, 1896, was call night of the Michaelmas term for all four Inns, and sixty-four students were called to the bar, as against sixty called at the same time last year.

Charles Noble Gregory.

MADISON, WIS., 1897.

CORPORATE VOTING AND PUBLIC POLICY.

WE often find sweeping expressions in the decisions to the effect that in private corporations the right of suffrage cannot be lawfully disassociated from the ownership of the shares, and that one cannot lawfully hold the shares and another lawfully exercise the right of suffrage that pertains to said shares. The shareholder is said to have a duty to fulfil towards his co-shareholders and to the State which conferred upon him a franchise *for the benefit of the public*. This duty is declared to require him to express his own voice and exercise his own reason in the management of the affairs of the corporation. It is not intended to deny the right, now generally conceded by statute, to permit another to vote by proxy from the owner of the shares, but to insist that no agreement can be made, or proxy given, which shall be irrevocable or binding upon the owner of the shares.

In *Woodruff v. Dubuque and S. C. R. Co.*,¹ it is said (*obiter*) that the right to control the vote upon shares "*apparently* cannot be granted away separately from its ownership." In *Griffith v. Jewett*,² where shares were assigned to trustees with an irrevocable power to vote thereon, the trustees issuing in lieu thereof negotiable certificates, the Superior Court of Cincinnati, on motion of one of these stockholders, enjoined the trustees from voting on his particular stock, and said that under the conditions of such a trust, "the party holding the entire beneficial interest in the stock cannot cast the vote thereof, while it may be voted by one having no interest in it, or in the Company: and so it may come to pass that the ownership of a majority of the stock of a Company may be vested in one set of persons, and the control of the Company irrevocably vested in others. It seems clear that such a state of affairs would be intolerable and is not contemplated by the law; the universal policy of which is that the control of stock companies shall be and remain with the holders of the stock. The right to vote is an incident of the ownership of stock, and cannot exist apart from it." The same Court refused a similar application for this injunction, made by a stockholder, whose shares were not in question.³ In

¹ 30 Fed. Rep. 91, 93.

² *Zimmerman v. Jewett*, 19 Abb. N. C. 459.

³ 15 Wk. L. B. 419.

Hafer v. N. Y. Co.,¹ where the purpose of the "trust" was to work out a scheme, illegal in itself, the Court said: "The law has confided the care of the franchises and property of this Company to the stockholders, and it is the duty of each stockholder to vote for directors of the Company with an eye singly to its best interests. . . . A sale by a stockholder of the power to vote upon his shares is illegal for very much the same reason that a sale of his vote by a citizen at the polls, or by a director of a corporation at a meeting of the Board, is illegal. Each is a violation of duty; in effect, if not in purpose, a betrayal of trust." In *Ohio R. Co. v. State*,² an agreement providing for the voting of shares by trustees as stockholders of record, in accordance with the previous instructions of a Committee of Stockholders, whose instructions were to be determined by a vote of the majority of the Committee, it was said that "such an agreement differs widely from agreements whereby the stock is placed in the hands of trustees who are invested with the power of voting it as their interests may dictate, irrespective of the wishes or direction of the owners. Such an agreement as the latter would be void as against the policy of our corporation law." In *Moses v. Scott*,³ where the Court was asked to enforce an agreement, void as an unlawful restraint upon alienation, it was said: "Whether an agreement to vote as a unit, or as an agreed majority may dictate for any given length of time, is a contract so binding in its terms that no party to it can withdraw from it or disregard it without the consent of his fellows, may be a very different question. Possibly public policy may exert an influence in the solution of this problem; and even if such a contract be lawful, and on its face exert a continuing force, the grave question comes up, will a Court of Chancery, in its enlightened discretion, lend its aid to the enforcement of a contract of so doubtful policy?"

In *Gage v. Fisher*,⁴ it was attempted to enforce a voting agreement, the consideration for which was the promise of an office in the corporation. The Court said: "Here a contract was to give a minority stockholder the right to dominate and direct the judgment of the plaintiff as stockholder in the voting of his stock, without owning the stock himself. Every other stockholder had the right to demand that the plaintiff should, if he desired to do so, ex-

¹ 14 Wk. L. B. 70.

² 49 Ohio St. 668.

³ 84 Ala. 608.

⁴ 1 N. Dak. 813.

ercise at the very time of the annual meeting his own judgment as to the best interests of all the stockholders, untrammelled by dictation and unfettered by the obligation of any contract. We know of no case where equity has enforced such an agreement." In *Harvey v. Linville Imp. Co.*,¹ the Court said that all agreements and devices by which stockholders surrender their voting powers are invalid. "The power to vote is inherently annexed to and inseparable from the real ownership of each share, and can only be delegated by proxy with power of revocation. The pooling arrangement admitted to have been entered into by the majority of stockholders in the present case, is contrary to public policy and void." Greenhood on Public Policy, page 502, says: "Any contract by which the owner of corporate stock deprives himself of the important rights which accrue from such ownership, is void," although he seems to state it the other way in his Rule 544. Cook on Stockholders, Sect. 610, says: "A proxy is always revocable. Even when by its terms it is made irrevocable, the law allows the stockholder to revoke it. Frequently an attempt is made to permanently unite the voting power of several stockholders, and thus control the corporation by giving irrevocable proxies to specified persons. But the law allows the stockholder to revoke the proxy at any time." A similar doctrine is contended for by Professor Baldwin in the first article of Volume I of the Yale Law Review.

It will be found upon investigation that the language used in practically all of these decisions is much broader than was called for by the facts involved in them, and therefore is open to the usual objection that it probably was not considered to the extent to which it goes. And neither Greenhood nor Cook cites any cases that on their facts sustain the doctrine as stated by them. But the language used is sufficiently positive to justify an inquiry as to that principle of public policy which the Courts had in mind and which is said to be violated by agreements separating the right to vote on shares from their so-called ownership. It should be remembered at the outset that corporation law is still in the development stage, but it will be seen that this development is all in the direction to make this doctrine, without proper qualification, illogical and untenable.

How, then, do these agreements injuriously affect the welfare of the public? Public policy is a vague principle at best, and except

¹ 24 S. E. Rep. 489 (N. C.).

as we follow the beaten path, an uncertain and therefore dangerous one to follow. Agreements void as against public policy are generally classified as those, *a*, founded upon corrupt considerations or moral turpitude; *b*, in violation of a public trust; *c*, in restraint of trade or marriage; *d*, to influence persons in authority. The law really recognizes only two kinds of wrongs: those that are inherently so, — that is, speaking popularly, morally wrong; and those that are wrong because prohibited. There clearly is no moral wrong in the making, but only in the violation of an agreement, made without any corrupt motive for the voting of shares. It must be asked, therefore, of what express law the agreement violates the policy. What principle of express corporation law is infringed by such agreement? The ground of objection is stated to be that the voting power ought not to be confided to persons having no interest in the welfare of the corporation. But as to this certainly, it may be urged at the outset, that in at least one instance, the existing corporation statutes recognize a different policy. In almost every State, where general corporation statutes have been enacted, it is provided that no person shall vote at a meeting who has not held shares in his name upon the books of the corporation, for a certain number of days prior to the election. Sometimes the transfer books are required to be closed at some time prior to the election. If, under such a law, a stockholder should sell his shares and indorse his certificates and receive the purchase price within those intervening days, he would cease to have any beneficial interest whatever in the shares, or in the corporation, and yet he would be entitled to vote. It was expressly so decided in *People v. Robinson*.¹ And if the purchaser of those shares were to secure, as part of the consideration for the payment of the purchase price, a proxy to vote upon the shares, would the transaction be illegal or immoral, or would the proxy be revocable?

So, too, general corporation laws almost universally provide that all transfers of shares, not registered upon the books of the corporation, shall be void except between the parties thereto. Under this provision, can the corporation or other stockholders successfully challenge the vote of the transferrer, whose name appears on the books of the corporation as the registered owner, because of the fact that he has no beneficial ownership in the corporation?

¹ 64 Cal. 373.

It might perhaps be said more plausibly, that at the time when voting by proxy was prohibited, the making of an agreement by which the owner of shares parted with the right to vote upon them, would have been against the policy of express corporation law. It is universally conceded that in the absence of statute, a proxy to vote upon shares is void.¹ But this rule of the common law has been abrogated practically everywhere, and we find the change occurring at the time when general laws are enacted providing, as a matter of common right, for the obtaining of charters, upon the perfunctory execution of simple declarations and the payment of nominal fees. In other words, it might be well said, that at a time when charters are granted as a matter of personal favor, and because of the special confidence reposed by the State in its trusted subjects, one of the privileges connected with the incorporation of companies being the ownership of shares and the right to vote thereon, that that and all other rights granted by the Charter should be restricted to those in whom the special confidence had been reposed. But if the reason for the rule contended for be that the stockholder, because of the special confidence reposed in him, has received a franchise from the State, in which the public has an interest, and that he therefore virtually receives and must hold and use his stock, as a public trust, that cannot any longer be the rule because the reason itself has ceased. Corporate franchises are now rarely acquired by special grant from the State. Any persons (with certain unimportant qualifications), however unworthy, may by their own action form a corporation, and may immediately transfer the corporate franchise to other persons, even more unworthy. The State has no voice in the matter; there is no *delectus personarum*. The right to incorporate is statutory, "free to everybody. The rights in the corporation can be adjusted by contract and the terms fixed by contract. The corporation is little more under our laws than a joint-stock company under the English laws; indeed, in its true nature, more nearly resembling a limited partnership, under special articles, than a corporation at common law."² When the policy of the State changes to the point that the obtaining of charters is a matter of universal right, the restriction upon the personnel of the voter should be removed. And when, as now, the right to vote by proxy has become established, so that a

¹ Thompson on Corporations, sec. 736.

² *Chater v. Sugar Refinery Co.*, 19 Cal. 245; see *N. E. Trust Co. v. Abbott*, 162 Mass. 148.

stockholder may delegate by proxy, *without consideration* and to one who has no interest in the shares, or in the corporation, the *revocable* right to vote, why can he not, for a valuable consideration and for an honest purpose, give that right to another irrevocably? It is to be noted, in this connection, that at least one very respectable Court has gone so far as to decide that an agreement between stockholders *not* to vote by proxy is itself pernicious and void as against public policy.¹ Not alone then, according to this authority, is this duty not one that the trustee must perform himself (*delegatus non potest delegare* to the contrary notwithstanding) but he cannot even by agreement deprive himself of the power to disassociate the right of suffrage.

The purpose of voting agreements is generally to control the election of directors.

It is conceded to be the general rule, sanctioned by the policy of the law, that those who have the largest interest in corporations may combine to control them, even by preliminary concert and agreement, as they have the greatest interest that they should be well managed.² And it is admitted that neither a minority stockholder, nor the corporation, nor the State, can complain of an agreement by the stockholder giving to another the right to vote, the contention going substantially no further than to insist upon the right of the shareholder to withdraw at any time from such agreement.³ But it should make no difference in principle whether a majority of stock is held by a single individual, or by a number of them acting in common, or through selected representatives; or whether the representatives be selected through the medium of a power of attorney or an agreement. Again, it will be admitted that the ownership of shares represents a double right,—the right to vote and the right to participate in profits. If it be lawful to sell an interest in the latter right, as it undoubtedly is, why not then, in the former? From that point of view, the party accorded the right to vote becomes a part owner of the shares, and there is no longer a disassociation of ownership from voting power, but only of voting power from the right to dividends. This would therefore seem to be the better doctrine, and one with which probably no case, upon its exact facts, is in conflict.

¹ Fisher v. Bush, 35 Hun, 641.

² See Barnes v. Brown, 80 N. Y. 547, and Havemeyer v. Havemeyer, 43 N. Y. Super. Ct. 506.

³ Griffith v. Jewett, *supra*.

The question always should be, has the agreement been made upon a sufficient consideration, and for an honest, as distinguished from a corrupt, purpose? In *Brown v. Pacific S. S. Co.*¹ the provisions of the agreement under consideration were substantially that the parties to it were not to sell their stock without having first offered to sell it to the rest of their associates at a price not above the then current market value, and, in case of their declining to take it, without next offering it to certain bankers. The agreement took the shape of an irrevocable power of attorney to these bankers to vote upon the stock. In answer to the objection that the agreement was against public policy, and void, Judge Blatchford said: "The agreement seems to differ very little from a mere power of attorney or proxy to Brown Brothers & Company to vote upon these shares, with the addition that the power is irrevocable, and that there are certain privileges reserved to the owners of the stock in regard to the manner of dealing in it and withdrawing from the arrangement. I am unable to perceive anything in this contrary to public policy, or anywise open to objection." In *Faulds v. Yates*,² where three shareholders agreed to vest in a third person for a certain time the right to vote all the shares owned by them in severalty, but together representing a control of the corporation, and the validity of the agreement was in question, it was said that "there was no fraud in the agreement; there was nothing unlawful in it; there was nothing which necessarily affected the rights and interests of the minority. . . . If this combination was fraudulent and intended for bad purposes, the stockholders who are in a minority, and who may have suffered, have ample redress."

In *Mobile & Ohio Co. v. Nicholas*,³ where there was involved the validity of an agreement for the reorganization of a railroad company, by which, for a certain time, the stockholders vested in a trustee an irrevocable power to vote the stock, the Court said: "We have examined case after case, and find generally that the agreements declared void, where the power to vote was separated from the stockholder and invested in third persons, were, under circumstances which showed that the purpose to be accomplished was unlawful, such as the Court would not sanction if the principal had voted, and not a proxy; and in cases of a mere dry trust, it is held that the stockholder may revoke the power of attorney in

¹ 5 Blatchf. 525.

² 57 Ill. 416.

³ 98 Ala. 92.

form irrevocable. . . . If there were no precedents, upon principle we would hold that, in determining the validity of an agreement which provides for the vesting of the voting power in a person other than the stockholder, regard should be had to the condition of the parties, the purpose to be accomplished, the consideration of the undertaking, interests which have been surrendered, rights acquired, and the consequences to result. The law does not make contracts for parties, neither will it annul them, except to preserve its own majesty, and to serve the greater interests of the public."

This case admirably suggests the features by which all the cases holding agreements of this character void or revocable are to be distinguished. The test is, first, to determine if there is a sufficient consideration for the agreement, and, secondly, if the consideration itself is tainted with illegality. If there be no consideration at all, as is ordinarily the fact in cases of so-called naked or dry trusts, then it is like every other case of a promise without consideration, or of an offer not accepted. The agreement is not binding upon the promisor, and he may withdraw from it; not because it is against public policy, but because it is without consideration. So too, if the consideration be illegal, as it would be where holders of shares, representing in the aggregate a majority, agreed to control the election of directors, and through them the officers, for the purpose of parcelling out offices and salaries between themselves, or to enable one corporation to control another, or to obtain contracts from the corporation out of which the parties combining are to make a personal profit. The agreement is illegal only because the consideration is illegal. Instances of the case of a dry trust are to be found in *Griffith v. Jewett*, *supra*, and *Vanderbilt v. Bennett*,¹ and of corrupt consideration in *Hafer v. N. Y. Co.* and *Gage v. Fisher*, *supra*, *Bostwick v. Chapman*,² and *Cone v. Russell*.³

In *White v. Thomas Co.*,⁴ where it was contended that a contract for pooling shares and giving the minority shareholders the power to elect a majority of electors was contrary to public policy and void, the Court said that the weakness of that contention lay in the fact that the voting trust was a part of the original contract between the original parties, and "was made for a proper purpose, and for a good consideration." The consideration was the advancement of cash by the promoters of the corporation, organized to exploit a patent, and the substance of the agreement was that

¹ 2 Ry. & Cor. L. J. 409.

² 60 Conn. 553.

³ 48 N. J. Eq. 208.

⁴ 28 Atl. Rep. 75 (N. J.).

while these promoters should have the control of the management of the enterprise, the owner of the patent should have the majority of the profits. "So long as each retained his original interest, and no other rights intervened, I see no difficulty in holding such contract valid, and its enforcement proper and practicable. I see nothing in it contrary to public policy."

This reasoning, however, suggests another distinction sometimes referred to, which it seems difficult to support upon sound principles, where parties take with notice of the facts. It is difficult to understand how an agreement, valid at the outset between the parties and not violating any principle of public policy, can become invalid in that respect by any change in the ownership of the shares in question, or in the affairs of the corporation. So too, it is sometimes said in cases of pooling agreements, or generally, of agreements vesting the power to vote shares in others than the owners, that they are not void as against public policy, and are valid agreements so long as the parties to the agreement are content to abide by them, but are revocable at the pleasure of any party to the agreement. This is the adjunct to the doctrine that neither the State, nor the corporation, nor stockholders not parties to the agreement, can complain of it. In the words in which this doctrine is stated, it cannot be sound. If a valid agreement — that is, one made upon a sufficient consideration — is entered into between owners of shares, vesting in others the right to vote them, and the agreement is not void as against public policy, it is like any other agreement and cannot be abrogated without the consent of all the parties to it. Of course, where this arrangement does not take the shape of an agreement between shareholders and is nothing more than a concurrent act by which they severally vest in a naked trustee the right to vote the shares, and no consideration is paid by any one to secure this right to the trustee, the case would seem to be the ordinary one of an authority from a principal to an agent, not coupled with any interest, and therefore revocable at the pleasure of the principal. The principal has the right to revoke the authority, not because any principle of public policy is violated in permitting one who is not the owner of the shares to vote upon them, but because there is no principle by which the authority can be made out to be irrevocable. This was the case of *Griffith v. Jewett*, *supra*, where the action was not between different stockholders, brought to sustain an agreement as against each other, but a suit by the stockholder

against the trustee to restrain him from voting upon the complainant's shares; the Court saying: "There was no consideration moving from the trustees to the stockholders to support the agreement, and the trust is not coupled with any interest in the trustees." Where the trustee represents creditors as well as shareholders, as he did in *Mobile & Ohio Co. v. Nicholas*, *supra*, and *Ervin v. Reading Co.*,¹ this is said to be an active as distinguished from a dry or naked trust, and the power becomes irrevocable, except upon the consent of all concerned. In the latter case it was said: "On general principles the right to vote on stock cannot be separated from the ownership, in such sense that the elective franchise shall be in one man and the entire beneficial interest in another; nor to any extent, unless the circumstances take the case out of the general rule. It matters not that the end is beneficial and the motive good, because it is not always possible to ascertain objects and motives, and if such a severance were permissible, it might be abused." The circumstance that took that case out of the general rule was nothing more than the existence of a consideration. Again in *Cone v. Russell*, *supra*, it was said of the pooling or combining of stock that this is not forbidden where the object is to carry out a particular policy with a view to promote the best interests of all the stockholders; "the propriety of the object validates the means and must affirmatively appear." In the light of the facts of that case, these words mean nothing more than that the consideration for the pooling agreement shall not be unlawful. Another distinction is suggested by one of the cases. It is said that not only must the consideration for these agreements not be unlawful (that is, have any corrupt elements entering into the transaction) in the sense above pointed out, but that it must be valuable, and that the consideration is insufficient if it consists simply of promise for promise. This is one of many of the grounds of decision in *Fisher v. Bush*,² where the Court says: "Mutual promises alone do not constitute a good and sufficient consideration in contracts of this character. . . . It is essential to the validity of such agreements that there should be a special consideration paid to the promisor by the promisee." The soundness of this distinction is not apparent, but it has been seized upon by commentators as stating the law, and accepted without question.³ It is difficult to perceive why an

¹ 7 Ry. & Cor. L. J. 87.

² 28 Am. & Eng. Enc. of Law, 502.

³ 35 Hun., 641.

agreement between two shareholders to vest in a third person, for a limited time and for no unlawful purpose, the right to vote their shares should be void as against public policy, while, if accompanied by some additional, substantial consideration, running to the owner of the shares, it would be valid; it being of course elementary that, as an ordinary principle of the law of contracts, mutual promises by themselves do constitute an adequate consideration, that is to say, sufficient to make the agreement binding.

It would seem, finally, that the State, as such, has no right to complain of these agreements for corporate voting; that they are no affair of the corporation itself, or of shareholders not party to the agreements. Neither the State nor the corporation, nor the other stockholders can or should control the transfer of ownership of shares, and therefore they should have no right to interfere with the transfer of some part of the interest owned, as, for instance, the right to vote upon the shares for a limited time. But if we eliminate the State and the corporation and the other stockholders, there is nothing left of the agreement to distinguish it from any other, or that should make its validity subject to any tests not applicable to every other agreement. I do not believe that any shareholder owes to his fellow shareholders any more of a duty to retain the right to vote upon his own shares, than he does to vote upon them at all, or not to sell, or not to sell them to any one unworthy; or that agreements given to others than the owners of shares the right to vote on them are illegal, except when their purposes are illegal; or that the control of the election of directors by itself is an illegal purpose. In the case of mere "dry trusts," that is to say, trusts not supported by any consideration, it may be that the stockholder should have the right at will to revoke the trust, but in the present state of corporation law I do not see why voting agreements should not be as valid as any other agreements, subject to only the same tests and entitled to the same respect and protection of the law. It has been well said by so distinguished a judge as Sir George Jessel: "It is the paramount policy not to interfere with the right of contract."

Jesse W. Lienthal.

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COMPULSORY LAW-SCHOOL ATTENDANCE.—The position taken by the New York authorities in increasing the requirements for admission to the Bar has been most gratifying. A further improvement is now advocated by the Board of Law Examiners of that State. In a paper read before the recent meeting of the State Bar Association at Albany, Mr. Franklin M. Danaher, speaking for the Board, strongly recommends the successful completion of at least a full two years' course of study in an approved law school as a requisite for admission. According to the Examiners, the clerk system of the present day, though by no means valueless, furnishes nevertheless an insufficient training for professional life; and they find the solution of the problem in the suggested requirement. That compulsory law-school attendance would result in greatly improving the general character of the Bar, and in adding to its usefulness, there can be no doubt. Apparently, too, there exist no valid objections to the adoption of such a plan. It is true that many able and successful lawyers have not had the advantages of a well equipped law school, but for the more exacting demands that the future promises to make upon the legal profession there must be a more thorough preparation than there has ever been in the past. Furthermore, few worthy of attaining success at the Bar would be deterred from entering the profession by this added requirement, and, as was remarked by Mr. Justice Brewer in his excellent address entitled "A Better Education the Great Need of the Profession," there are certainly many who really "ought to be deterred." The medical profession has for some time required of applicants for admission an attendance at some approved school, and the profession of law should not be slow in making a similar provision, both for its own protection and for the benefit of society in general.

CAN A MAN BE COMPELLED TO VOTE?—The legislature of Missouri recently devised a novel scheme for making the exercise of the right of suffrage compulsory. A provision was inserted in the charter of Kansas City to the effect that every qualified voter who failed to vote at a regu-

lar election should be fined \$2.50. This was a bold attempt to bring out the stay-at-home vote, and would very likely have met with considerable success. Unfortunately, however, a delinquent voter objected to paying the fine, the matter was taken into the courts, and the provision in the city charter was declared unconstitutional. The opinion of the court has not yet come to hand, but so far as can be learned from the quotations that have appeared in newspapers and legal journals, it consists largely of talk about the degradation of the franchise which results from associating it with the money value of a vote. Unless there is some peculiar provision in the Missouri Constitution, the decision seems wrong. In the ordinary constitution the only clause which an enactment like that in question could violate is that which guarantees liberty to every citizen. If the word "liberty" be given the very broad meaning, which courts to-day often ascribe to it, of liberty to enjoy all civil rights, possibly it is unconstitutional to compel a man to vote. But that the framers of the Constitution in all probability used the word in its primary and natural sense of mere freedom from bodily restraint, is clearly the better view. See an article on the subject by Mr. Charles E. Shattuck, in 4 HARVARD LAW REVIEW, 365. With that clause of the Constitution out of the way, it is hard to see why the legislature has not the power to make the exercise of the right of suffrage a legal duty. Whether or not such an experiment would lead to satisfactory results is another question.

TRIAL BY EIGHT JURORS.—Among the extensive changes in the jury system made by the recent Constitution of Utah is the provision that, "In courts of general jurisdiction, except in capital cases, a jury shall consist of eight jurors." In *State v. Bates*, 47 Pac. Rep. 78, it was contended that in a criminal case it is a violation of the Fourteenth Amendment to have but eight jurors." The court, however, shortly and effectively disposes of the objection. The amendment does not define the privileges and immunities of citizens of the United States, but, whatever they are, the power of a State to establish tribunals is not limited by the provision. Nor are twelve jurors necessary to due process of law, which is a requirement of trial according to law, both as to the substance of the crime and the mode of procedure. It does not determine what is crime, nor does it establish any mode of procedure. It is a shield against the exercise of arbitrary power, but does not prevent changes in the law.

This is an interesting decision, more for the novelty of the question than for any difficulty. In most State constitutions the trial of crimes by a common-law jury of twelve is secured. The case of *Copp v. Henniker*, 55 N. H. 179, is instructive on the scope of such provisions. It is well settled that in civil actions trial by jury is not necessary. *Walker v. Sauvinet*, 92 U. S. 90. See also *Higgins v. Farmers' Ins. Co.*, 60 Iowa, 50, where there was a jury of six. But no real distinction can be drawn in this respect between civil and criminal cases. In *Hurtado v. California*, 110 U. S. 516, the Supreme Court decided that indictment by a grand jury is not necessary. The same principle was involved.

The Constitution of Utah also provides that, "In civil cases, three fourths of the jurors may find a verdict." An agitation for some such change has recently been started in New York, in order to prevent one or two obstinate jurors from forcing the others to render an unreasonable

verdict. Not to require unanimity in criminal cases, however, strikes one as of doubtful propriety. Yet there would seem to be no constitutional difficulty, apart from special provisions in State constitutions, that does not exist equally in civil cases. If sounder verdicts are to result in civil cases, why not also in criminal? Such a trial is arbitrary in both or in neither. However, before advocating the change in criminal cases it would be better to have it demonstrated by experience that good results do follow in civil cases.

THE SOUTH CAROLINA DISPENSARY LAW UNCONSTITUTIONAL. — The Dispensary Law of South Carolina has just been declared unconstitutional in *Scott v. Donald*, 17 Sup. Ct. Rep. 265. This measure has attracted attention throughout the country by reason of its many novel features. Furthermore, the name of its well known author, Senator Tillman, has served to invest the law with an unusual amount of popular interest. The statute in question was peculiar in several respects. It did not purport to prohibit entirely the manufacture and sale of intoxicants, but placed the complete control of this business in the hands of the State. The essential provisions of the law were, that retail sales of liquor should be made only by certain dispensers authorized by the State; that these dispensers should be supplied by the State commissioner; that the commissioner should purchase from the manufacturers, and submit all liquor so purchased to the State chemist for examination; and not until the liquor had been pronounced pure and so labelled was the commissioner permitted to distribute it for selling purposes among the dispensers. No one except the commissioner could buy either from persons within or without the State, unless such persons were dispensers. In his purchases the commissioner was required to give to home producers the preference over those of other States. The profits of the trade were to be divided between the State and the different counties.

The opinion of the majority of the court, in an exhaustive review of all recent cases in which similar points were involved, declares that the measure cannot be considered an inspection law, since the citizens are prohibited from importing all liquors whether pure or impure; and that it is an unwarrantable obstruction to commerce, as discriminating unfairly against the products of other States. It was argued in favor of the law, that such legislation was made possible by the "Wilson Bill," so called, enacted by Congress soon after the famous case of *Leisy v. Hardin*, 135 U. S. 100. This bill was passed for the express purpose of allowing States to legislate upon imported liquors as fully as upon those of domestic manufacture. But the decisive answer to this contention was, that the Dispensary Law did not affect residents and non-residents of the State alike. The "Wilson Bill" was not intended as a protection to partial and discriminating legislation. It allowed absolute prohibition, or such regulations as operated equally upon all. But there must be uniformity. The citizens within the State could not be treated in one way and those outside in another. Upon this broad ground the majority of the court seem principally to base their decision.

Mr. Justice Brown, in his dissenting opinion, while admitting the possible invalidity of some parts of the law as having a discriminating effect, yet holds that this does not apply to the main provisions, which should

therefore be upheld, as the statute is severable. This exact point does not appear to be discussed very fully in the majority opinion.

The case is very similar to *Minnesota v. Barber*, 136 U. S. 313, in which the same result was reached. But in all questions of interstate commerce, where the relative powers of the States and the Federal government are involved, the true rule, in point of principle, would seem to be for the courts to decline to interfere, unless the State statute be arbitrary or partial, or touch subjects which clearly require one uniform system throughout the country, leaving to Congress its legitimate function of revising, in whatever way it sees fit, such State legislation. See 10 HARVARD LAW REVIEW, 378.

THE PRESENT CONSTITUTION OF THE PRINCIPAL COURTS OF ENGLAND.—The interest attaching to the recent promotion of the Hon. Sir Joseph William Chitty from the Chancery Division to the Court of Appeal suggests that a few words concerning the English courts may not be out of place. Since 1873 the judicial system of England has been so radically and so frequently amended that to many its present arrangement is largely matter of conjecture. The Supreme Court of Judicature is the collective name applied to Her Majesty's High Court of Justice and Her Majesty's High Court of Appeal. The former is a court of original jurisdiction, and is composed of three divisions. These are the Queen's Bench, Chancery, and Probate, Divorce, and Admiralty Divisions. The first consists of a President, who is the Lord Chief Justice of England, and fourteen puisne judges; the second is composed of five judges; a President and a single associate form the third. The divisions are made merely for convenience, as each court has all the powers and jurisdiction of the others; that is, a chancery judge may probate a will if he wishes, but refrains from considerations of expediency. Though appointed to a particular division, any judge may sit and act in any of the three courts. These provisions are the result of the Judicature Acts of 1873 and 1875, a main object of which was the fusion of law and equity. The title of a judge is not derived from his own division, but is Justice of the High Court.

The other division of the Supreme Court, the High Court of Appeal, consists of the Master of the Rolls, who is now judge of appeal only, and whose title is entirely dissociated from its historical significance; five judges with the title of Lords Justices of Appeal, and the following *ex officio* members: the Lord Chancellor, the Lord Chief Justice of England, the President of the Probate, Divorce and Admiralty Division, and all ex-Chancellors. The Court of Appeal sits in two divisions, from one to the other of which the judges constantly change. From this court their lies an appeal to the House of Lords, which may be heard only when at least three Lords of Appeal are present. The Lords of Appeal are the Lord Chancellor, any member who holds or has held high judicial office, this signifying ex-Chancellors and judges and ex-judges of Her Majesty's High Courts, and four Lords of Appeal in Ordinary. These last are life peers with the title of Baron, appointed for the purpose of strengthening the House of Lords as a court. Final appeals from the Colonies and in ecclesiastical matters are sent to the Judicial Committee of the Privy Council. This committee is composed of the Lord President of the Council, any member who holds or has held high judicial

office, and the Lords of Appeal in Ordinary. The Lord Chancellor is appointed by the Prime Minister, and as he is a member of the Cabinet, presiding officer of the House of Lords, and goes out with his party, his position as judge is anomalous. His functions as a judge of the Chancery Division, seldom exercised since 1875, have now been formally taken away. All the other judges are appointed by patent from the Crown on the advice of the Lord Chancellor, and hold office during good behavior.

THE LIMITATIONS IN CHUDLEIGH'S CASE. — One of the best examples in the books of the ingenuity of early conveyancers is to be found in *Chudleigh's Case*, 1 Rep. 114. One Richard Chudleigh, Knight, there appears as grantor in a deed by which lands were conveyed to trustees in fee to the use of the said Chudleigh and his heirs on the body of Elizabeth, then wife of Richard Bampffield, lawfully to be begotten; for default of such issue, to the use of said Chudleigh and his heirs on the body of Laurentia, wife of Robert Fulford, lawfully to be begotten; and so on until the names of four other married women had been similarly employed; finally, if Chudleigh should die without issue by any of them, then, after his death, the trustees were to hold the estate to their own use during his eldest son Christopher's life, and after his death, to the use of his first and other sons successively in tail.

The curious form of these limitations has often been noticed. A correspondent in the January number of the *Law Quarterly Review* calls attention to an explanation of them in Popham, 70, 76, where there is a report of the case under the name of *Dillon v. Fraine*. "In as much as the manner of assurance made by Sir Richard Chudleigh may seem strange, and in some manner to touch the reputation of the said Sir Richard (who was a grave and honest gentleman) to those who hear it, and do not know the reason why he did it," Popham says that it is only just to add a word of explanation. And he proceeds to relate how Sir Richard's son Christopher had committed murder and fled to France, and the father, doubting what would become of his estate if he should die before settling it, and yet wishing to retain the power of destroying, by a common recovery, any settlement he might make, had been advised by counsel to convey the land in the above manner. He thus succeeded in preventing his son Christopher from inheriting the estate, and at the same time did not prejudice his other issue, "because he never had a purpose to marry with any of these wives." The reason why so many married women were introduced into the settlement would appear to be, as the writer in the *Law Quarterly Review* remarks, to guard against the contingency of Sir Richard being left tenant in tail after possibility of issue extinct; which would have hindered him in suffering a recovery.

WHEN WILL EQUITY SET ASIDE A VOLUNTARY SETTLEMENT? — Under what circumstances a party shall be allowed to revoke his own voluntary settlement of property, containing no power of revocation, is a question on which there has been much fluctuation of opinion in both England and America. In the recent case of *Richards v. Reeves*, 45 N. E. Rep. 624 (Ind.), the court, in deciding that the maker of an improvident voluntary settlement, without a power of revocation, might have had it set aside, state the rule to be "that in a voluntary settlement the absence

of a power of revocation throws upon the person seeking to uphold the settlement the burden of proving that such a power was intentionally excluded by the settlor, and that in the absence of such proof the settlement may be set aside." In the actual case the settlor was dead, and the court held that the plaintiff was not entitled to the benefit of the equitable right of the settlor in this respect; notwithstanding that it fairly appeared from all the circumstances that there was no definite intent to make an irrevocable gift. The court seem to have considered that a voluntary settlement ought always to be considered as revocable, unless it was shown positively that the settlor's attention was especially directed to the absence of the power of revocation, and he expressly declared his intention to exclude it. Such a very strict technical rule might indeed be fairly supposed to exist in England, from the cases of *Coutts v. Ackworth*, L. R. 8 Eq. 589, and *Wollaston v. Tribe*, 9 Id. 44; but in later cases the court refused to go to such a length, as appears from the well considered opinion in *Hall v. Hall*, L. R. 8 Ch. 430. The state of the law since *Hall v. Hall*, and the leading American case of *Garnsey v. Mundy*, 24 N. J. Eq. 243, of about the same date, was admirably summed up in a note by Mr. Bispham, in 13 American Law Register, 349. Mr. Bispham reduced the rule to this form: "Where the deliberate intent to make an irrevocable gift does not appear, and where no motive for such a gift is shown, the absence of a power of revocation is *prima facie* evidence of mistake." What evidence will suffice to show a deliberate intent, or an adequate motive from which it may be inferred, must depend on the circumstances of each case, as also perhaps on the temper of the court. The Massachusetts court, as appears from the case of *Taylor v. Buttrick*, 165 Mass. 547, is little disposed to set aside voluntary settlements except for fraud or duress; the absence of a power of revocation being considered in that jurisdiction as only slight evidence of mistake.

TITLE TO LOST CHATTELS. — A recent English decision of considerable importance in connection with the question as to the title to lost chattels, the real owner of which cannot be found, is *South Staffordshire Water Co. v. Sharman*, [1896] 2 Q. B. 44. In this case the defendant, a workman, while engaged under the plaintiff's directions in cleaning out a pool of water on land owned and possessed by the plaintiffs, found two gold rings in the mud at the bottom of the pool. The real owner not appearing, it was held that the water company was entitled to the rings, the decision being rested upon the broad ground that, where chattels are found on private premises, the one in possession of such premises — unless he has invited the public to resort there — is presumed to have been in possession of the chattels themselves, even though he was unaware of their presence. For this proposition the court relies upon the theory advanced in Pollock and Wright's *Essay on Possession*, pp. 37-42. See also Holmes, *The Common Law*, pp. 206-246.

Apparently, however, the position of the court is at variance with the decision in the leading case of *Bridges v. Hawkesworth*, 21 L. J. Q. B. 75, where the court held that one who found chattels upon a shop floor had a good title as against all but the true owner, it being immaterial whether the property was found on the public street or on private premises. It is conceived, furthermore, that the reasoning of the court in

South Staffordshire Water Co. v. Sharman, is inconsistent with certain well established principles of the law of larceny, and with such cases as *Merry v. Green*, 7 M. & W. 623, and *Durfee v. Jones*, 11 R. I. 588. See Clerk & Lindsell on Torts, 2d ed., 686a-686d.

The decision in the case under discussion might possibly have been rested upon either one of two grounds not chosen by the court, — that the rings had become part of the realty, or that the defendant was under the duty of handing over to his master, the plaintiff company, any articles which he might find. Ordinarily, the rights of the finder are not affected by the relationship of master and servant, but, if the servant is hired for the very purpose of finding articles lost by third parties, the master, and not the servant, is entitled to them. See 18 Am. Law Register, 698, 699: 19 Irish Law Times, 107. Considering the nature of the defendant's employment in *South Staffordshire Water Co. v. Sharman*, it is certainly difficult to see why both the finding and removal of lost articles were not directly within the contemplation of the parties, and why therefore the company, as master, was not entitled to the rings. Even, however, if the defendant was not expressly employed to find lost chattels, the finding was clearly incidental to the main service; and here also, on principle at least, the master's rights should prevail.

DEFEATING A TESTATOR'S WISHES. — It would be difficult to find in the books a more extraordinary example of the frustration by the courts of a testator's wishes than is furnished by the case of *Edson v. Bartow*, 41 N. Y. Supp. 723. This was an action brought by the next of kin to impose a trust on a bequest to the executors, and to declare that trust invalid. The terms of the bequest thus sought to be nullified were as follows: "If, for any reason any legacy . . . fail, . . . I give and bequeath the amount which shall not take effect absolutely to the persons named as my executors. In the use of the same I am satisfied that they will follow what they believe to be my wishes. I impose upon them, however, no conditions; leaving the same to them absolutely, and without limitation or restriction." The grounds advanced by the appellant for imposing the trust were that there was a secret understanding between testatrix and executors that the latter were to take, not beneficially, but subject to a legal obligation to carry out certain trusts expressly declared in previous sections of the will, and which in a former suit had been held void for indefiniteness. *Fairchild v. Edson*, 77 Hun, 298. If these trusts could be fastened on the apparently absolute bequest to the executors, they would of course be equally invalid in this form, and the next of kin would be let in. It must be admitted that the propositions of law necessary to support the appellant's position, while open to criticism in point of principle (see an article on the Failure of the "Tilden Trust," 5 HARVARD LAW REVIEW, 389), are sustained by the authorities. *Russell v. Jackson*, 10 Hare, 204; *O'Hara v. Dudley*, 95 N. Y. 403.

But did the facts of the case warrant the application of principles of questionable justice and expediency? In other words, what was the evidence of a secret undertaking on the part of the executors? They were three in number; one of them, Mr. Parsons, drew up the will, while the other two knew nothing of its contents until after the death of the testatrix. All were men of integrity, and anxious to fulfil what they believed to be a moral obligation. The court properly held that, as by

statute the executors took as tenants in common (*In re Kimberly's Estate*, 44 N. E. Rep. 945), the knowledge and act of one could not bind the others. *Rowbotham v. Dunnett*, 8 Ch. D. 430. Two then were held to take beneficially. The manner in which the court dealt with the case of Parsons is subject for wonderment. They were able to find an agreement between him and Miss Edson, that he should take the bequest subject to a legal obligation. This agreement they implied merely from the fact that Parsons knew the contents of the will. Solely because the executor was aware that Miss Edson wished to establish certain express trusts if possible, the court said he was as legally bound by the terms of the absolute bequest as by the declared trusts. They laid stress on his acquiescence; what he acquiesced in they seem not to have considered. He agreed, it is true, to what the testatrix wished. But is it not clear that she declared her willingness to rely on the honor of her executors in the event of failure of the express trusts? Was it not a moral obligation, merely, that she intended to impose? Why was the absolute bequest added if the testatrix expected it to have the same effect as the bequests on trust? In the light of a common sense reading of the will, it is difficult to understand how the court reached their conclusion, and the lamentable result of their reasoning makes its fallacy more apparent. Mr. Justice Ingraham, who dissented on the ground that the secret trust should bind all the executors, seems to be not without a sense of humor. He says, "It is a canon of construction universally applied, that the sole object of a court is to ascertain and enforce the intention of the testator."

THE RULE AGAINST PERPETUITIES. — The head-note to *Pulitzer v. Livingston*, to be reported in the 89th of Maine, ends with the words, "*Slade v. Patten*, 68 Maine, 380, overruled." It is a satisfaction to find a court willing to come out squarely against its former erroneous decision, instead of being content to distinguish it on a narrow ground, really unsatisfactory in point of principle. As has been remarked, however, "The history of the Rule of Perpetuities is full of slips by eminent judges, often acknowledged by themselves." The Supreme Judicial Court of Maine does well at the first opportunity to clear away the confusion which the writer who criticised *Slade v. Patten*, in 14 Am. Law Rev. 237, feared that the case would produce in the law of Maine.

Slade v. Patten was a case of a devise of land in trust for the testator's daughter and her heirs. This was held too remote, because, there being no provision for the termination of the trust, it might continue beyond the period allowed by the rule. In *Pulitzer v. Livingston* the owners of undivided interests in large tracts of land in this country conveyed to trustees, to hold in trust for the grantors, with full powers of sale and disposal, unlimited in point of time but with power to revoke reserved by each grantor as to his interest. It was held that the power of sale was not void for remoteness, the test being that the owners of the equitable estate had absolute power over the property. But the existence of the express power of revocation, "a most important difference" between the case before the court and *Slade v. Patten*, and sufficient for a distinction, did not deter them from showing most emphatically that neither the actual decision nor the equally objectionable *dictum* in that case is law in Maine.

Apart from clearing up the law on the validity of vested equitable estates

of indefinite duration, and showing that the Rule against Perpetuities is only concerned with the time of the vesting of future estates, *Pulitzer v. Livingston* is a valuable case on the question of the validity of powers of sale. A power of sale which may be exercised beyond the period of lives in being and twenty-one years is not bad if it is within the control of the owner of the estate, just as a contingent limitation after an estate tail is unobjectionable, because at any time it may rightfully be destroyed. See Gray, *Perpet.* §§ 490, 498, 506. While in *Pulitzer v. Livingston* each *cestui* could revoke the trusts as to his share, should a different result be reached where all the *cestuis* must join to defeat the power of sale? There is no practical reason for a difference, and technical requirements seem to be fully satisfied if the power is actually destructible. That is the result in *Seamans v. Gibbs*, 132 Mass. 239, though the reasons given are not satisfactory. In *Goodier v. Edmunds*, [1893] 3 Ch. 455, however, it was held otherwise, but without any allusion to this question. See 7 HARVARD LAW REVIEW, 427, where that case is criticised.

INJUNCTIONS AGAINST INTERFERENCE WITH BUSINESS.¹ — After an elaborate reargument by the complainants, the Supreme Court of Rhode Island in a short rescript has recently affirmed their prior decision in the case of *Macauley Bros. v. Tierney*, 33 Atl. Rep. 1. At the time of its prior decision, the case attracted considerable attention and some adverse comment. It belongs to that general class of cases which appears to be rapidly increasing in number at the present day, in which the plaintiffs seek to enjoin the defendants from interfering with their business rights. The list of cases in which the plaintiff has succeeded in this is a very long one; and those in which the defendants have succeeded in avoiding an injunction against them, though not nearly as numerous, yet constitute a respectable number, of which *McGregor v. The Mogul Steamship Co.* is the leading case. In all this class of cases the plaintiffs generally allege the acts of the defendants as wrongfully and maliciously contrived to injure them. This allegation, if not absolutely essential, is sufficient if maintained by proof, and is easily made. But malice being a question of fact, such a complaint is good upon demurrer, the malice being thereby admitted, and consequently such cases as *Dels. v. Winfree*, 80 Tex. 400, and *Olive v. Van Patten*, 7 Tex. Civ. App. 630, both of which contained such allegations and were decided upon demurrer, while correctly decided, are not opposed to other similar cases which were not decided upon demurrer, although they are stated to be so in a note to the case under discussion in 24 Am. Law. Reg. 776. The defence of the exercise of a legal right or privilege is so far an affirmative one that it must be set up by the defendants, as a consideration of the articles of J. H. Wigmore and Judge Holmes in previous numbers of this REVIEW will show. Judge Holmes in his excellent article has also shown that a privilege or excuse of the defendant for the commission of a tortious act has its foundation and its limitation in a broad public policy.

The contention is made, however, in the class of cases under discussion, that, "if the acts of the parties to the agreement are such that they do not serve a legitimate purpose, but appear to be wanton and malicious, an ac-

¹ For this note the Editors are indebted to Mr. William R. Tillinghast, of Providence, R. I.

tion will lie at the suit of the party injured." 24 Am. Law Reg. 776, 777. But, as intimated above, malice or ill will is a matter of fact, and as such is to be found by the jury, and it is scarcely conceivable that a sound public policy can require, after the court has determined that a contract is not void as a matter of law, that it shall still be submitted to a jury to determine whether or not it has been made maliciously. And further, when the subject to be dealt with is not a contract at all, but merely the negative privilege of refusing to make a contract, how can it possibly be submitted to a jury? It appears to be inconceivable that the freedom of trade so tenderly nurtured by English and American law could endure such a restraint. The alternative of making the privilege of contracting or refusing to contract wellnigh absolute, has almost universally been adopted by the courts. The only case to be found, it is believed, in which this defence was properly set up and failed, is *Jackson v. Stanfield*, 137 Ind. 592, but it is to be said that in that case the defendants had gone so far as to require and collect a money penalty from the seller, which may be outside a proper privilege, although the court in deciding the case does not appear to rest its opinion upon any such ground, and the Minnesota court in *Bohn Mfg. Co. v. Hollis*, 51 Minn. 227, 232, a case growing out of similar facts except that this penalty had not there been collected, does not seem to think this feature would destroy the privilege. But unless the case of *Jackson v. Stanfield* can be reconciled on this ground, it seems clearly to be opposed to every case of a similar kind, either in England or the United States, that has come under observation.

Another and very interesting question appears to be further raised, however, by such cases as that of the *Toledo, &c. Ry. Co. v. Pennsylvania Co.*, 54 Fed. Rep. 730, 737, 738, and *Temperton v. Russell*, [1893] 1 Q. B. 715; namely, whether the privilege set up in defence must not be, not only personal to the defendant, but also for his own benefit. If we can neglect the duty imposed upon a common carrier by common law and Federal statute, which existed in the former of these cases, they seem to present a state of facts essentially as follows. The defendants in these cases had directed or threatened to direct the members of the voluntary associations of which they were officers to cease to work unless certain demands of theirs were complied with, and it would seem safe to assume that such a refusal to work in any ordinary case would certainly be their undoubted right and privilege. But in these cases the refusal was made or threatened, not for the benefit of those refusing to work, but to assist others to accomplish their object; in other words, the strikes were or would have been what are commonly called "sympathetic." In both cases the defendants were enjoined. If, disregarding the duty resting upon common carriers, these cases are rightly decided, it would seem to follow that the privilege set up in defence must be exercised for the personal advantage of the defendant, it may be of course in common with others, but not for the benefit solely of others. In other words, the privilege finds its limitation, as a matter of law, in the benefit to be obtained for the person exercising it and those acting with him. Is this the law? If so, every "boycott," as distinguished from a "strike," is illegal, whether accompanied by threats and intimidation or not. It would seem doubtful if such were the law at present.

RECENT CASES.

AGENCY—STATUS OF ARCHITECT.—The plaintiff was employed by the defendant to prepare plans for a house. The defendant told him what he wanted, and that the cost should not exceed \$2,500. The plaintiff furnished the plans, but the cost was too large. *Held*, error to instruct that, if the plaintiff accepted the restriction as to cost, he must make the plans accordingly before he could recover any pay. *Coombs v. Beede*, 36 Atl. Rep. 104 (Me.).

The court rest their opinion on the ground that the instruction is misleading, as it does not make allowance for the good faith of the architect and the chance of miscalculation inherent in making the plans. The facts of the case indicate that the architect was not a contractor, but merely an agent, and as such he was bound only to use his skill in performing his agency according to the instructions given him. The case is in line with the responsibility of a lawyer or a physician.

BILLS AND NOTES—CHECK PAYABLE TO FICTITIOUS PAYEE.—The plaintiff drew a check payable to a non-existing person, his clerk having told him that he was indebted to such person. The clerk then indorsed it to the defendant, a *bona fide* purchaser for value, using the fictitious name. The defendant received payment from the plaintiff's bank, and the plaintiff seeks to recover the amount. *Held*, the check was payable to bearer, and the defendant is entitled to keep the proceeds. *Clutton v. Attenborough*, 13 *The Times* L. R. 114.

The case rests ultimately on the construction of the clause of the Bills of Exchange Act, which declares that "where the payee is a fictitious or non-existing person the bill may be treated as payable to bearer." At the same time it seems an unfortunate construction to disregard the intention of the drawer of the check as to who shall be the payee. In the principal case the drawer never intended his clerk to get the money, while in the case of *Bank of England v. Vagliano*, [1891] A. C. 107, which the court regard as conclusive of the present case, it was the clerk who was the drawer of the bill and his employer the acceptor. Clearly in that case the drawer meant the bill to be payable to himself by the fictitious name. The construction adopted is at variance with the generally received doctrine that where X gets goods from the owner, either falsely representing that they are for A, or representing that he himself is A, a *bona fide* transferee of X gets no title. *Cundy v. Lindsay*, L. R. 3 A. C. 459; *Hardman v. Booth*, 32 L. J. Exch. 105; *Hents v. Miller*, 94 N. Y. 64; *Barker v. Dinsmore*, 72 Pa. St. 427. The point in the principal case has been decided in favor of the drawer in New York, under a substantially similar statute. *Shipman v. Bank*, 126 N. Y. 318.

BILLS AND NOTES—TRANSFER AFTER MATURITY—NOTICE OF EQUITIES.—*Held*, where one, to whom notes payable to bearer have been delivered without indorsement, for safe keeping only, transfers them after maturity as his own, for a valuable consideration, his transferee is charged with notice as against the owner, that the transferor held the notes merely as depositary. *Quimby v. Stoddard*, 35 Atl. Rep. 1106 (N. H.).

The decision is in line with the authorities, but it is thought that on principle a different result should have been reached. There is a clear distinction between the transferee after maturity from a holder against whom the parties to the note had some defence, and the transferee after maturity from a trustee. The former is chargeable with notice, because possession after maturity tends directly to show that the holder is unable to collect; but it does not in any way tend to show that, if the holder did collect, another would be entitled as *cestui*. This being so, the decision is inconsistent with the rule that the purchaser of trust property, without notice, takes it freed from the trust.

CARRIERS—EXPRESS PROVISION LIMITING LIABILITY.—The defendant inserted an express provision in a contract of carriage, that he would not be liable for a sum exceeding an agreed valuation of \$100. *Held*, the provision was valid, although the jury found that the actual value of the goods was \$250. *Loefer v. Chicago, M., & St. P. Ry. Co.*, 69 N. W. Rep. 372 (Wis.).

The decision places Wisconsin in line with the great weight of authority. *Hart v. R. R.*, 112 U. S. 331; *Squire v. R. R.*, 98 Mass. 239; *Belger v. Drismore*, 51 N. Y. 166; *Oppenheimer v. U. S. Ex. Co.*, 69 Ill. 62; *Elkins v. Transportation Co.*, 81 Pa. St. 315; *R. R. v. Henlein*, 52 Ala. 606; *Harvey v. R. R.*, 74 Mo. 538. But see, *contra*, *Ex. Co. v. Moore*, 39 Miss. 822; *U. S. Ex. Co. v. Bachman*, 28 Ohio St. 144; *R. R. v. Simpson*, 30 Kan. 645; *Moulton v. R. R.*, 31 Minn. 85. The reason also for the rule in the principal case is sound. A carrier may charge more for carrying a costly article than one

of less value, because his risk is greater. That he might also limit his liability by an express agreement as to its value, for the purpose of carrying at a smaller rate, would seem to be but a corollary of the former proposition, and no more against public policy.

CONFLICT OF LAWS — APPLICATION OF STATE STATUTE OF LIMITATIONS TO FEDERAL STATUTES. — *Held*, that the right of a receiver of an insolvent national bank to enforce the liability of stockholders, though created by United States statute, is barred by the running of a State statute of limitations. *Thompson v. German Ins. Co.*, 76 Fed. Rep. 892.

The court rests its decision, without much discussion, upon the case of *Campbell v. Haverhill*, 155 U. S. 610. Prior to that decision there was some conflict of authority. *Hayden v. Oriental Mills*, 15 Fed. Rep. 605, *accord*; *Brichell v. Hartford*, 49 Fed. Rep. 372, *contra*. That the question has been justly settled seems clear, for the fact that Congress has created a new right should not operate so as to clear it of the defences to which a defendant in ordinary cases is entitled.

CONSTITUTIONAL LAW — EQUAL PROTECTION OF THE LAW. — An ordinance provided that no further interments should be made in the city of San Francisco, except by those who already owned lots purchased for that purpose. *Held*, unconstitutional. Such burials may be wholly prohibited, but, "while they are permitted within a district, the privilege cannot be limited to one class of citizens." *Ex parte Bohen*, 47 Pac. Rep. 55 (Cal.).

The court thus ignores the fundamental proposition that special legislation is not necessarily unequal legislation. See *Barbier v. Conolly*, 113 U. S. 27. The ordinance here appears to provide most wisely for the gradual doing away with burials in the city, without causing great injury to those who have already invested their money in cemetery lots. But if this were not so, the measure would not be unconstitutional unless the legislature has acted arbitrarily. The case is an extreme example of the well intentioned officiousness of a court in taking upon itself the responsibilities of government.

CONSTITUTIONAL LAW — INTERSTATE COMMERCE. — A State statute provided that no liquors containing alcohol should be bought of any one except county dispensers; that the State commissioner, who had authority to supply the county dispensers, should purchase liquors for this purpose, preferring in his purchases home producers to those of other States; and that only such liquors should be furnished to the dispensers for general sale as had first been examined by the State chemist and pronounced pure. *Held*, that the law was an unconstitutional interference with interstate commerce. *Scott v. Donald*, 17 Sup. Ct. Rep. 265. See NOTES.

CONSTITUTIONAL LAW — STATE REGULATION OF TOLLS ON TURNPIKE ROADS. — In 1890, the Kentucky legislature passed a statute which provided that a certain turnpike corporation should charge no tolls in excess of those prescribed by the statute. This act of 1890 was disregarded by the turnpike company, and a bill was filed to compel it to respect the provisions of the act. The defendant alleged that, if the statutory rates of toll were enforced, its receipts would shrink to such an extent that it could neither maintain its road in a fit condition for public travel, nor pay any dividends to its stockholders. *Held*, that the act of the Kentucky legislature amounted to depriving the defendant of property without due process of law, and for that reason was unconstitutional. *Covington & Lexington Turnpike Road Co. v. Sanford*, 17 Sup. Ct. Rep. 198.

Previous to the above case, the important question involved had been thoroughly discussed only in the case of *Reagan v. Mercantile Trust Co.*, 154 U. S. 362. That case agrees substantially with the present one, and the two, taken together, seem to lay down the following proposition. Where a State legislature, or a commission appointed by a State legislature, fixes such a schedule of charges that those in that public business to which the schedule applies are unable, without loss to themselves, to perform their duties to the public and to their stockholders, then the action of the State amounts to depriving persons of property without due process of law; provided (and this is important) that the inability to perform public and private duties is caused by the action of the State, and is not attributable to other and wholly external causes, such as bad times, bad business management, etc. The above proposition seems to contain a sensible rule for answering the question as to whether a State has or has not acted arbitrarily. It is to be noticed, first, that inability to pay dividends will not of itself be a ground for complaining against a State's action; and, secondly, that it must be clear that there are no external causes which are making rates, which otherwise would be reasonable statutory provisions, appear unreasonable and insufficient.

CONSTITUTIONAL LAW — TAKING PROPERTY WITHOUT DUE PROCESS OF LAW. — A Nebraska statute provided that it should be unlawful for any common carrier to give any preference or advantage to, or to subject to any prejudice or disadvantage, any particular person, corporation, etc., in any respect whatsoever. The statute also created a board of transportation for the purpose of enforcing the above provision. The appellant had granted to two private firms the privilege of erecting elevators upon its right of way at a certain station. A number of private individuals petitioned this board of arbitration to give them the right to erect an elevator on the appellant's property, alleging that the two elevators then in existence did not afford sufficient accommodation, and had combined to raise prices. The board made an order in accordance with the prayer of the petition. *Held*, this order was unconstitutional, in that it deprived the appellant of property without due process of law. *Missouri Pac. Ry. Co. v. Nebraska*, 17 Sup. Ct. Rep. 130.

This decision reverses the judgment of the Supreme Court of Nebraska, given in 29 Neb. 550. The case seems clear. No question is raised as to the power of the Legislature to compel the appellant to maintain such elevators as are necessary for the accommodation of the public, nor as to its power to exercise a general control over the conduct of appellant's business. On the contrary, the case presents an attempt on the part of the State to compel the railroad to give over its property to a number of private individuals. Admitting that the railroad holds its property for the use of the public, this act of the State deprives it of private property in order that private persons may be benefited. This cannot be considered due process of law. See *Wilkinson v. Leland*, 2 Pet. 627; *Davidson v. New Orleans*, 96 U. S. 97. As appellant's property here was not to be taken for any public purpose, no question of eminent domain arises, and consequently it would seem to make no difference in the present case whether or not appellant was to be given compensation for the loss of its property.

CONSTITUTIONAL LAW — TRIAL BY EIGHT JURORS. — The Constitution of Utah declares that a jury shall consist of eight jurors. *Held*, that this is not a violation of the Fourteenth Amendment. *State v. Bates*, 47 Pac. Rep. 78 (Utah). See NOTES.

CONTRACTS — DAMAGES FOR BREACH OF COVENANT TO CONVEY. — Defendant contracted to convey to plaintiff unimproved land, with warranty of title. Before conveyance was to be made, plaintiff erected buildings on the land, at his own instance. In an action on the contract to recover damages for failure to convey, the defendant's title having proved defective, *held*, that the value of the buildings could not be recovered. *Gebbert v. Congregation of the Sons of Abraham*, 35 Atl. Rep. 1121 (N. J.).

This case is good law. The covenant here was simply to convey the land as it then was, and if a purchaser thinks proper to incur expenses, at his own instance, before title passes, he does so at his risk. *Smith v. Smith*, 28 N. J. L. 208; *Flureau v. Thornhill*, 2 W. Bl. 1078; *Bain v. Fothergill*, L. R. 7 H. L. 158. In an action on a warranty for eviction, damages are in general confined to the amount of purchase money. One cannot recover for improvements, nor increased value of land; and if no money has been paid for the land, only nominal damages are allowed. *Pitcher v. Livingston*, 4 Johns. 1; *Morris v. Rowan*, 17 N. J. L. 304. There is no reason why a different rule should be made in the principal case, where the defendant is unable to convey owing to a defect in the title. *Flureau v. Thornhill*, and *Bain v. Fothergill*, *supra*. Of course, where there is fraud or deceit on the part of the covenantor, the covenantee has his proper remedy, — an action for deceit.

CONTRACTS — STATUTE OR FRAUDS — ORAL AGREEMENT A DEFENCE TO BILL IN EQUITY. — Plaintiff and defendant, railroad companies, each being desirous of crossing the other's tracks at different points, entered into a verbal agreement for such mutual rights of crossing. In pursuance thereof, plaintiff crossed defendant's tracks, but filed a bill to enjoin defendant from crossing plaintiff's tracks at the point agreed upon. *Held*, that although the contract was void under the statute of frauds, still it might be proved in resistance to a bill for an injunction. *Denver, &c. R. R. Co. v. Kristine*, 77 Fed. Rep. 58.

That a contract within the statute of frauds may be set up as a defence in equity seems well established; *Browne*, Stat. of Frauds, § 129. Where the action is at law, however, a difference of opinion exists. *King v. Welcome*, 5 Gray, 41, is to the effect that a contract of hiring, within the statute of frauds, cannot be proved to resist a *quantum meruit* by a plaintiff who has left within the period of service provided for by the contract. The court in that case conceded that, if the contract had been an oral one for the sale of land, and the money had been paid by the vendee, the vendor could set up his willingness to go on with the contract against a suit to recover back the money. It is submitted that no sound distinction can be drawn between the two classes of cases, and that the decision in *Philbrook v. Belknap*, 6 Vt. 383, which admitted such evidence of a verbal hiring, represents the better law.

CONTRACTS — STATUTE OF FRAUDS. — *Held*, that a verbal contract to maintain a switch for plaintiff's benefit for shipping purposes, "so long as he may need it," is not within the Statute of Frauds as being an "agreement not to be performed within the space of one year from the making thereof." *Warner v. Texas & P. R. R. Co.*, 17 Sup. Ct. Rep. 147.

It seems rather strange that this point has not been definitely settled in the Supreme Court before, when the law in England appears to have been so since the time of Lord Holt. *Peter v. Compton*, Skin. 353. The general rule appears to be, that where the contract is such that the whole *may* be performed within a year, and there is no express stipulation to the contrary, the statute does not apply. *McGregor v. McGregor*, 21 Q. B. D. 424. But a contract for a term specified of more than a year, determinable by notice within a year, is held to come within the rule. *Birch v. Liverpool*, 9 B. & C. 392. As the question is so largely one of construction, it may naturally be expected that the various states have not adopted a uniform rule. However, the cases collected in Browne, Stat. of Frauds, § 272 *et seq.*, show a marked tendency to follow the English doctrine. The question is whether the contract, according to the reasonable interpretation of its terms, requires that it should not be performed within a year.

CONTRACTS — USURY — LIABILITY TERMINATED BY BORROWER'S DEATH. — The defendant borrowed money of the plaintiff to be repaid in monthly instalments, but in case of the defendant's death the unpaid portion to be released. At the same time the plaintiff obtained from an insurance company a policy on defendant's life, which fully indemnified him from any possibility of loss in case of defendant's death before full payment. The amount to be paid by the defendant was largely in excess of the principal of the loan, with the highest interest allowed by law and the cost of the insurance paid for by the plaintiff. *Held*, that the contract was void, as a cover for usury. *Kansas & Texas Trust Co. v. Krumseig*, 77 Fed. Rep. 32.

This case is interesting as an illustration of the futile subterfuges resorted to by certain lenders in their attempts to evade the usury statutes. The plaintiffs contended that, as the defendant would be relieved of payments in case of death, there could be no question of usury. But the court rightly held that the contingency was a flimsy pretext. The real meaning of the contract was, that the borrower was to pay at a usurious rate if he lived, and if he died the lenders were to be indemnified by insurance nominally paid for by them, but in reality by the funds illegally secured from the borrower. The courts will not suffer the statute to be evaded by a mere colorable device.

CORPORATIONS — LIABILITY OF COUNTIES FOR DEFECTS IN HIGHWAYS. — *Held*, that a county is not liable for injury to land where a bridge erected by the county was built so negligently as to cause a stream to change its course. *Davies v. Ada County*, 47 Pac. Rep. 93 (Idaho).

The weight of authority is, that, while cities may be held liable for damages arising from negligence in the maintenance of public ways, counties are exempt. The reason for the distinction is not clear. Cities, to be sure, partake of the nature of private corporations, and are often liable as such; but they are ordinarily not liable in the exercise of governmental functions. It is because a county exercises purely governmental functions that it escapes liability, and when a city engages in exactly the same work it should be exempt for the same reasons. The alternative would seem to be to make both liable. 2 Dillon, Munic. Corp., 4th ed., § 998.

CORPORATIONS. — UNCONSTITUTIONAL ENABLING ACT. — By *quo warranto* proceedings, a general statute for the formation of boroughs was declared unconstitutional. *Held*, nevertheless, that a borough already incorporated under this statute could continue to act as a *de facto* corporation until direct proceedings were taken against it. *Coast Co. v. Spring Lake*, 36 Atl. Rep. 21 (N. J.).

To enable a corporation to exist *de facto*, there must be a *bona fide* attempt to organize under an existing law, and so it is still an open question whether such a corporation can be organized under an invalid one. From the practical standpoint, the difficulty of determining the question of constitutionality, and the confusion occasioned by unsettling business transactions entered into *bona fide*, afford a strong argument for admitting its *de facto* existence. Such reasoning has prevailed in the New Jersey court, but even so the basis of this doctrine is the mistake of the parties. Acts which were never authorized are allowed to stand because it was supposed that the authority had been given. According to the principal case no incorporation would be valid if attempted with knowledge of the *quo warranto* proceedings of the Attorney General, for the courts do not wish to encourage acts which are known to be forbidden by the Constitution of the State. This same reasoning would seem to apply equally to

transactions after incorporation, if all the parties concerned knew that the law from which the corporation claimed its existence had been held null and void. The court, in reaching a contrary conclusion, were much influenced by the inconvenience of leaving a borough without a government.

CRIMINAL LAW — APPEAL — ABATEMENT BY DEATH. — *Held*, when one appeals from a criminal conviction and dies before the appeal is prosecuted, his personal representative cannot carry on the appeal, though there is a judgment for costs which binds the estate of the deceased. *State v. Martin*, 47 Pac. Rep. 196 (Ore.).

At common law, an appeal could be brought by the representative to reverse an attainder of treason or felony, in order to remove the corruption of blood and the forfeiture of estate, (*Marsh's Case*, 1 Leon. 325, and *Williams v. Williams*, Cro. Eliz. 557,) and as the latter are both abolished, the court consider that the common law reason for such appeals no longer exists. But a judgment for costs binding the estate seems, as far as it goes, to give the representative an exactly similar interest. The case, however, is in *accord*, both in decision and reasoning, with *O'Sullivan v. The People*, 144 Ill. 604, regarding the judgment for costs as a mere incident to the real question.

EQUITY — IMPROVEMENTS MADE UNDER MISTAKE AS TO TITLE. — Defendant had improved land by building thereon, supposing he had acquired title to the land under foreclosure proceedings. In fact, the defendant had not acquired an indefeasible title, having failed, through ignorance of a later recorded mortgage, to make the second mortgagee a party to the foreclosure suit. *Held*, the second mortgagee was entitled to redeem only on condition of reimbursing the defendant the value of the betterments made before actual knowledge of the second mortgage was brought home to him. *Ensign v. Batterson*, 36 Atl. Rep. 51 (Conn.).

This case is but an application of the maxim that he who seeks equity must do equity. Doing equity under these circumstances consists in paying the defendant the value of improvements made by him under a *bona fide* mistake as to title. Keener, *Quasi Contracts*, 377. It is interesting to note this case as one in which the constructive knowledge which one has of all recorded interests has not the same effect as actual notice of such interest.

EQUITY — SETTING ASIDE A VOLUNTARY SETTLEMENT. — *Held*, that a voluntary family settlement will be set aside, when it appears that the grantor did not intend it to be irrevocable; but after the death of the settlor, the party seeking to set it aside must show himself entitled in equity to the benefit of the settlor's right. *Richards v. Reeves*, 45 N. E. Rep. 624 (Ind.). See NOTES.

EQUITY — SUBROGATION. — Where land was sold to satisfy a valid lien for a drainage assessment, but the purchaser failed to get a good title, *held*, that the State's lien for the drainage assessment will be revived in equity for the benefit of the purchaser. *Reed v. Kalfsbeek*, 45 N. E. Rep. 476 (Ind.).

An obligation satisfied at law will be revived in equity for the benefit of one who has extinguished the obligation at law in consequence of compulsion, or to protect a threatened business interest. Thus, a judgment creditor who purchases property sold to satisfy his judgment, but fails to get title, may revive the satisfied judgment in equity. *McGhee v. Ellis*, 4 Litt. 244. In many cases, a stranger purchasing at an execution sale under a valid judgment has been given the same aid in equity. This extension of the doctrine of subrogation meets with the approval of Mr. Freeman. Freeman on Executions, 2d ed., § 352. All the reasons urged for making this extension of the doctrine of subrogation are present in the principal case.

EVIDENCE — DIRECTION OF VERDICT. — *Held*, reversible error for a court to direct a verdict for defendant, though the evidence so preponderated in its favor that, had the jury found for the plaintiff, the court would have set aside the verdict as against the weight of evidence. *Luhrs v. Brooklyn Heights R. R. Co.*, 42 N. Y. Supp. 606.

The decision is unsatisfactory. It is generally said that the test of the right to direct a verdict is whether the court would be bound to set a verdict aside as against evidence if rendered against the party in whose favor it is directed. The court attempts, in the principal case, to restrict the meaning of the phrase "against evidence" to cases where the verdict is without evidence to support it. It is hard to see why it should not apply equally well to cases where reasonable men could not differ as to the preponderance of the evidence. As is said in *North Penn. R. R. Co. v. Commercial Bank*, 123 U. S. 727, "It would be an idle proceeding to submit the evidence to the jury, when they could justly find only in one way."

MUNICIPAL CORPORATIONS — ILLEGAL ACTIONS OF PUBLIC OFFICIALS — RIGHT OF INDIVIDUAL TO INTERFERE. — *Held*, that a resident taxpayer and voter may obtain

a writ of *certiorari* to test the legality of an act by the board of trustees of a township in uniting highway districts. *Dunham v. Cox*, 69 N. W. Rep. 436 (Iowa).

It is the general doctrine that a taxpayer may be recognized in equity to prevent misappropriation of public funds (2 Dillon, Munic. Corp., 4th ed., § 922), and it is not confined to cases of cities. In New York, however, it is held that the public alone can complain. *Roosevelt v. Draper*, 23 N. Y. 318. And see *Croft v. Jackson Co.*, 5 Kan. 518. If the taxpayer can interfere in those cases, there would appear to be no reason why he cannot under circumstances like those in the principal case. And if he is recognized in equity, it would seem that he should be allowed to proceed by way of *certiorari*. The case follows *Collins v. Davis*, 57 Iowa, 256.

PERSONS — DIVORCE — CONNIVANCE. — The plaintiff, suspecting her husband of infidelity, and being desirous of obtaining a divorce, employed detectives to procure the necessary evidence. The detectives engaged a lewd woman to lure the husband into an act of adultery, and afterwards gave such information to the plaintiff that she was able to confront her husband in a compromising situation with this woman. *Held*, although the plaintiff did not authorize the employment of the woman, the facts are such as to warrant an inference of connivance sufficient to bar the plaintiff's right to a divorce. *Dennis v. Dennis*, 36 Atl. Rep. 34 (Conn.).

The question involved in the above decision is largely one of fact, and the court simply sustains the finding of a single judge sitting without a jury. The case would be unimportant were it not for the proposition which the court lays down, to the effect that where a husband or wife hires a third person to procure evidence upon which to found an action for divorce, an inference of connivance will arise whenever the guilty acts are brought about by means of this third person. It is not uncommon for detectives to be employed as in the principal case, and the decision is apt to be followed as a precedent. *Gower v. Gower*, L. R. 2 P. & D. 428, is an authority in point.

PERSONS — LIABILITY OF FATHER TO SUPPORT INFANT CHILD. — During the pendency of a petition for divorce the court issued a temporary injunction against the defendant, restraining him from interfering with the wife's custody of the child. While the injunction was in force, the plaintiff furnished the child with necessities at the request of the mother. *Held*, the father is liable for necessities so furnished. *Shields v. O'Reilly*, 36 Atl. Rep. 49 (Conn.).

Assuming the legal obligation of the father to support the child, the decision seems right. The misconduct which deprives him of the right of custody will not excuse him from the liability to support. Or even assuming that he owes no legal duty to the child, the support of the child is one of the necessities of the wife for which the husband is liable. 2 Bish. Mar., Div., & Sep., § 1223. *Baseley v. Forder*, L. R. 3 Q. B. 559. *Pretsinger v. Pretsinger*, 45 Ohio St. 452. Many decisions apparently opposed to the principal case go on the ground that where a final decree of divorce is granted, and the wife is given the custody of the children, liability of the husband for the support of the children will be enforced only by granting to the wife an allowance for that purpose under the divorce proceedings. *Brow v. Brightman*, 136 Mass. 187; *Hall v. Green*, 32 Atl. Rep. 796 (Me.); *Brown v. Smith*, 33 Atl. Rep. 466 (R. I.).

PROPERTY — DEEDS — FRAUDULENT DELIVERY BY ESCROWEE. — A agreed to sell land to B, and placed the deed in C's hands to be delivered to B on payment of the purchase price. C delivered the deed before payment, and B mortgaged the land to D, who had no notice. *Held*, that A is estopped to set up his claim against a mortgagee who in good faith relied on the deed. *Shurts v. Colvin*, 45 N. E. Rep. 527 (Ohio).

The essential point is the effect of the wrongful delivery on the legal title. On this there is great conflict of authority. Several courts hold such a deed absolutely void; *Everts v. Agnes*, 6 Wis. 453; but the weight of authority is in agreement with the principal case that the legal title passes to the grantee, subject to the grantor's equitable right, which, however, he cannot set up against one who has relied on the deed. *Blight v. Schenck*, 10 Pa. St. 285; *Quick v. Milligan*, 108 Ind. 419.

PROPERTY — PERCOLATING WATER. — A appropriated the water of a stream which was fed by percolation from a spring on B's land. B enlarged the basin of the spring and diverted the water. *Held*, that B may be enjoined from taking water from the spring. *Bruening v. Dorr*, 47 Pac. Rep. 290 (Cal.).

The court recognizes the general rule that percolating water is not the subject of appropriation. *Ry. Co. v. Dufour*, 95 Cal. 615. But it agrees with the view of *Strait v. Brown*, 16 Nev. 317, that one who appropriates the waters of a stream acquires a property right in the springs which feed it, even though the water reaches it by percolation. While it is doubtful if such a rule would be applied to cases of natural rights, it seems to be a reasonable application of the Western doctrine of appropriation.

PROPERTY—WILLS—GENERAL AND SPECIFIC LEGACIES.—The testator bequeathed to several legatees in different amounts shares of stock in a certain corporation, using the language, "Shares of the stock of the X corporation now owned by me, and standing in my name on the books." These bequests amounted to 2,000 shares. When the will was made the testator owned 3,200 shares. At his death all but 200 of these had been sold. *Held*, that the legacies were not specific, and therefore not adeemed. *Mahoney v. Holt*, 36 Atl. Rep. 1 (R. I.).

Though formerly a matter of some doubt, it is now everywhere admitted that, if a legacy is specific, it is subject to ademption during the testator's life, and this utterly regardless of the testator's intention. *In re Bridle*, 4 C. P. D. 336. But the difficult question in the principal case is one of construction, in determining whether the words of the will are such as to constitute a specific legacy. Upon this point it would seem that the court might have reached a different conclusion. The language of the testator appears to indicate pretty clearly that he intended the shares to be taken from the number which he owned at the time of making the will; and the difficulty felt by the court, that any one lot of shares could not be identified and distinguished from other shares contained in similar bequests, has not been considered an insuperable objection to holding legacies of this kind specific. Williams on Executors, 9th ed., 1027, 1028. At the same time, the tendency has always been toward a construction in favor of regarding legacies as general rather than specific in doubtful cases.

STATUTE OF LIMITATIONS—ACCRUAL OF CAUSE OF ACTION.—*Held*, a cause of action against an abstractor of titles for giving a wrong certificate of title accrues at the date of the delivery, and not at the time the negligence is discovered or consequential damages arise, and action is barred by a three-years statute of limitations, though the plaintiff was ignorant during that time that any mistake had been made. *Provident Loan Trust Co. v. Walcott*, 47 Pac. Rep. 8 (Kan.).

There is hardship in this case, but an analysis of the grounds of the decision proves its correctness in point of legal principle. The cause of action is the breach of the contract to provide a careful abstract. That breach occurs when a negligently prepared abstract is delivered. From that moment the statute begins to run, and lack of knowledge on the part of the plaintiff cannot affect its operation. 2 Greenleaf on Evidence, § 435.

SURETYSHIP—GUARANTY OF NOTE—BURDEN OF PROOF.—Defendant transferred and guaranteed to plaintiff a note made in Wisconsin, in which State the maker resided at the time of the execution and of the guaranty. Before the maturity of the note, the maker removed from the State. Plaintiff sued on the guaranty. *Held*, that the burden was on the defendant to show that the maker had property in Wisconsin out of which the note could be collected, and not upon the plaintiff to prove that he had no such property within the State. *Fall v. Youmans*, 69 N. W. Rep. 697 (Minn.).

In *White v. Case*, 13 Wend. 543, it was held, under similar circumstances, that, though the plaintiff was not bound to pursue the maker when the latter had left the State, still it was incumbent on the plaintiff to prove that he had exhausted the remedy afforded by the laws of the State before he could recover from the guarantor. As the holder must show that the debt is not collectible from the maker before he can recover from the guarantor for collection (*Sylvester v. Donner*, 18 Vt. 32), the burden of proving that the maker has no assets within the jurisdiction is upon him, and the mere fact that the maker has left the State would not seem sufficient to relieve him of such burden. The doctrine of the majority of courts, that although the pursuit of an action to judgment, with a return of *nulla bona*, is one of the extreme tests of due diligence, yet such diligence may be satisfied by other means, as proof of insolvency (*Camden v. Doremus*, 3 How. 515) would seem to apply equally whether the maker is within or without the jurisdiction, and would relieve the plaintiff from proving a resort to service by publication in all cases where the maker had left the State.

SURETYSHIP—RELEASE BY EXTENSION OF TIME.—*Held*, that an agreement by the holder of a note to extend the time of payment indefinitely, though based on valuable consideration, does not discharge the surety. *Bunn v. Commercial Bank*, 26 S. E. Rep. 63 (Ga.).

When bankruptcy is imminent it may sometimes happen that a failure to demand immediate payment will involve the loss of the debt. Therefore, if the creditor does not press his claim, it is the right of the surety to discharge the obligation and come down at once on the debtor. This is admitted by the court, and that an agreement to forbear for a definite time would discharge the surety. It would seem that he is equally deprived of his rights by an extension for an indefinite time, i. e. a reasonable time. See *Oldershaw v. King*, 2 H. & N. 517; *Bank v. Parker*, 130 N. Y. 415; *Howe v. Taggart*, 133 Mass. 214. The doctrine that a surety is discharged by an extension of

credit is perhaps a hard one, and frowned upon by the courts; but there is no logical reason to justify an exception to the rule in the principal case.

TORTS — PRIVATE ACTION FOR A PUBLIC NUISANCE. — By reason of defendant's wrongful obstruction of a navigable river, plaintiff was compelled to let his steamboat lie idle above the obstruction. *Held*, plaintiff cannot maintain an action against defendant, since the wrong to him differed in degree only, and not in kind, from that sustained by the public at large. *Jones v. Ry. Co.*, 47 Pac. Rep. 226 (Wash.).

It cannot now be questioned that one who suffers a particular damage as a result of a public nuisance may recover his damages in an action at law. Pollock on Torts, 326. It is pretty clear that one who suffers a bodily injury or a physical invasion of corporeal property has sustained a particular damage within the meaning of this rule. But the authorities are most unsatisfactory as to when, if at all, one who suffers more loss than the public at large by reason of not being permitted to use a public highway may maintain an action at law. Cf. *Stetson v. Faxon*, 19 Pick. 147, with *Blackwell v. R. R. Co.*, 122 Mass. 1; *Fritz v. Hobson*, 14 Ch. D. 490, with *Rickett v. Metropolitan Ry. Co.*, 2 H. L. Cas. 175. *Contra* to the principal case, *Dudley v. Kennedy*, 63 Me. 465; *Knowles v. R. R. Co.*, 175 Pa. St. 623.

TRUSTS — BEQUEST ON SECRET UNDERSTANDING. — A testatrix made an absolute bequest of certain property to the executor who had drawn up her will, in case certain declared trusts in previous sections of the will should be held void. *Held*, that the executor's knowledge of the contents of the will implied a secret understanding that he would take bequest on trust; and that as the trust was invalid the next of kin should take. *Edson v. Bartow*, 41 N. Y. Supp. 723. (See NOTES.)

REVIEW.

THE LAW OF RECEIVERS. By Charles Fisk Beach, Jr. Second Edition, with Additions and Changes, by William A. Alderson. New York: Baker, Voorhis & Co. 1897. pp. lxx, 950.

This is a considerably enlarged edition of Mr. Beach's well known work on Receivers, containing all the additions and alterations necessary in a subject which has been so much developed in this country since the time when the original edition was published. It appears to be a very complete treatise on every portion of the law relating to this peculiarly modern and American piece of judicial machinery. We say peculiarly modern and American, because the employment of receivers, though in its origin, perhaps, as old as equity, has only in this country, and within less than half a century, become a topic of such importance as to deserve extended and separate consideration. Mr. Alderson seems to have done the work of collecting the later authorities with great thoroughness, and some of the sections which he has added contain remarkably far-sighted discussions of questions of present importance; but his style is decidedly careless compared with that of Mr. Beach. We should be glad to learn how to parse certain of his sentences (for examples see p. 72, line 11, and p. 881, line 8). The printer is perhaps responsible for these slips, as may be suspected from a sprinkling of misprints rather plentiful for a volume of such a good general appearance. On p. 697, at line 12, for instance, the important little word "not" seems to be lacking, and on p. 49 there are two misprints, one at line 15, and the other in note 2 at line 12. The book is well arranged, and contains a comprehensive index.

R. G.

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THE PATH OF THE LAW.¹

WHEN we study law we are not studying a mystery but a well known profession. We are studying what we shall want in order to appear before judges, or to advise people in such a way as to keep them out of court. The reason why it is a profession, why people will pay lawyers to argue for them or to advise them, is that in societies like ours the command of the public force is intrusted to the judges in certain cases, and the whole power of the state will be put forth, if necessary, to carry out their judgments and decrees. People want to know under what circumstances and how far they will run the risk of coming against what is so much stronger than themselves, and hence it becomes a business to find out when this danger is to be feared. The object of our study, then, is prediction, the prediction of the incidence of the public force through the instrumentality of the courts.

The means of the study are a body of reports, of treatises, and of statutes, in this country and in England, extending back for six hundred years, and now increasing annually by hundreds. In these sibylline leaves are gathered the scattered prophecies of the past upon the cases in which the axe will fall. These are what properly have been called the oracles of the law. Far the most important and pretty nearly the whole meaning of every new effort of legal thought is to make these prophecies more precise, and to

¹ An Address delivered by Mr. Justice Holmes, of the Supreme Judicial Court of Massachusetts, at the dedication of the new hall of the Boston University School of Law, on January 8, 1897. Copyrighted by O. W. Holmes, 1897.

generalize them into a thoroughly connected system. The process is one, from a lawyer's statement of a case, eliminating as it does all the dramatic elements with which his client's story has clothed it, and retaining only the facts of legal import, up to the final analyses and abstract universals of theoretic jurisprudence. The reason why a lawyer does not mention that his client wore a white hat when he made a contract, while Mrs. Quickly would be sure to dwell upon it along with the parcel gilt goblet and the sea-coal fire, is that he foresees that the public force will act in the same way whatever his client had upon his head. It is to make the prophecies easier to be remembered and to be understood that the teachings of the decisions of the past are put into general propositions and gathered into text-books, or that statutes are passed in a general form. The primary rights and duties with which jurisprudence busies itself again are nothing but prophecies. One of the many evil effects of the confusion between legal and moral ideas, about which I shall have something to say in a moment, is that theory is apt to get the cart before the horse, and to consider the right or the duty as something existing apart from and independent of the consequences of its breach, to which certain sanctions are added afterward. But, as I shall try to show, a legal duty so called is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by judgment of the court ;— and so of a legal right.

The number of our predictions when generalized and reduced to a system is not unmanageably large. They present themselves as a finite body of dogma which may be mastered within a reasonable time. It is a great mistake to be frightened by the ever increasing number of reports. The reports of a given jurisdiction in the course of a generation take up pretty much the whole body of the law, and restate it from the present point of view. We could reconstruct the corpus from them if all that went before were burned. The use of the earlier reports is mainly historical, a use about which I shall have something to say before I have finished.

I wish, if I can, to lay down some first principles for the study of this body of dogma or systematized prediction which we call the law, for men who want to use it as the instrument of their business to enable them to prophesy in their turn, and, as bearing upon the study, I wish to point out an ideal which as yet our law has not attained.

The first thing for a business-like understanding of the matter is to understand its limits, and therefore I think it desirable at once to point out and dispel a confusion between morality and law, which sometimes rises to the height of conscious theory, and more often and indeed constantly is making trouble in detail without reaching the point of consciousness. You can see very plainly that a bad man has as much reason as a good one for wishing to avoid an encounter with the public force, and therefore you can see the practical importance of the distinction between morality and law. A man who cares nothing for an ethical rule which is believed and practised by his neighbors is likely nevertheless to care a good deal to avoid being made to pay money, and will want to keep out of jail if he can.

I take it for granted that no hearer of mine will misinterpret what I have to say as the language of cynicism. The law is the witness and external deposit of our moral life. Its history is the history of the moral development of the race. The practice of it, in spite of popular jests, tends to make good citizens and good men. When I emphasize the difference between law and morals I do so with reference to a single end, that of learning and understanding the law. For that purpose you must definitely master its specific marks, and it is for that that I ask you for the moment to imagine yourselves indifferent to other and greater things.

I do not say that there is not a wider point of view from which the distinction between law and morals becomes of secondary or no importance, as all mathematical distinctions vanish in presence of the infinite. But I do say that that distinction is of the first importance for the object which we are here to consider, — a right study and mastery of the law as a business with well understood limits, a body of dogma enclosed within definite lines. I have just shown the practical reason for saying so. If you want to know the law and nothing else; you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience. The theoretical importance of the distinction is no less, if you would reason on your subject aright. The law is full of phraseology drawn from morals, and by the mere force of language continually invites us to pass from one domain to the other without perceiving it, as we are sure

to do unless we have the boundary constantly before our minds. The law talks about rights, and duties, and malice, and intent, and negligence, and so forth, and nothing is easier, or, I may say, more common in legal reasoning, than to take these words in their moral sense, at some stage of the argument, and so to drop into fallacy. For instance, when we speak of the rights of man in a moral sense, we mean to mark the limits of interference with individual freedom which we think are prescribed by conscience, or by our ideal, however reached. Yet it is certain that many laws have been enforced in the past, and it is likely that some are enforced now, which are condemned by the most enlightened opinion of the time, or which at all events pass the limit of interference as many consciences would draw it. Manifestly, therefore, nothing but confusion of thought can result from assuming that the rights of man in a moral sense are equally rights in the sense of the Constitution and the law. No doubt simple and extreme cases can be put of imaginable laws which the statute-making power would not dare to enact, even in the absence of written constitutional prohibitions, because the community would rise in rebellion and fight; and this gives some plausibility to the proposition that the law, if not a part of morality, is limited by it. But this limit of power is not coextensive with any system of morals. For the most part it falls far within the lines of any such system, and in some cases may extend beyond them, for reasons drawn from the habits of a particular people at a particular time. I once heard the late Professor Agassiz say that a German population would rise if you added two cents to the price of a glass of beer. A statute in such a case would be empty words, not because it was wrong, but because it could not be enforced. No one will deny that wrong statutes can be and are enforced, and we should not all agree as to which were the wrong ones.

The confusion with which I am dealing besets confessedly legal conceptions. Take the fundamental question, What constitutes the law? You will find some text writers telling you that it is something different from what is decided by the courts of Massachusetts or England, that it is a system of reason, that it is a deduction from principles of ethics or admitted axioms or what not, which may or may not coincide with the decisions. But if we take the view of our friend the bad man we shall find that he does not care two straws for the axioms or deductions, but that

he does want to know what the Massachusetts or English courts are likely to do in fact. I am much of his mind. The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.

Take again a notion which as popularly understood is the widest conception which the law contains; — the notion of legal duty, to which already I have referred. We fill the word with all the content which we draw from morals. But what does it mean to a bad man? Mainly, and in the first place, a prophecy that if he does certain things he will be subjected to disagreeable consequences by way of imprisonment or compulsory payment of money. But from his point of view, what is the difference between being fined and being taxed a certain sum for doing a certain thing? That his point of view is the test of legal principles is shown by the many discussions which have arisen in the courts on the very question whether a given statutory liability is a penalty or a tax. On the answer to this question depends the decision whether conduct is legally wrong or right, and also whether a man is under compulsion or free. Leaving the criminal law on one side, what is the difference between the liability under the mill acts or statutes authorizing a taking by eminent domain and the liability for what we call a wrongful conversion of property where restoration is out of the question? In both cases the party taking another man's property has to pay its fair value as assessed by a jury, and no more. What significance is there in calling one taking right and another wrong from the point of view of the law? It does not matter, so far as the given consequence, the compulsory payment, is concerned, whether the act to which it is attached is described in terms of praise or in terms of blame, or whether the law purports to prohibit it or to allow it. If it matters at all, still speaking from the bad man's point of view, it must be because in one case and not in the other some further disadvantages, or at least some further consequences, are attached to the act by the law. The only other disadvantages thus attached to it which I ever have been able to think of are to be found in two somewhat insignificant legal doctrines, both of which might be abolished without much disturbance. One is, that a contract to do a prohibited act is unlawful, and the other, that, if one of two or more joint wrongdoers has to pay all the damages, he cannot recover contribution from his fellows. And that I believe is all. You see

how the vague circumference of the notion of duty shrinks and at the same time grows more precise when we wash it with cynical acid and expel everything except the object of our study, the operations of the law.

Nowhere is the confusion between legal and moral ideas more manifest than in the law of contract. Among other things, here again the so called primary rights and duties are invested with a mystic significance beyond what can be assigned and explained. The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it, — and nothing else. If you commit a tort, you are liable to pay a compensatory sum. If you commit a contract, you are liable to pay a compensatory sum unless the promised event comes to pass, and that is all the difference. But such a mode of looking at the matter stinks in the nostrils of those who think it advantageous to get as much ethics into the law as they can. It was good enough for Lord Coke, however, and here, as in many other cases, I am content to abide with him. In *Bromage v. Genning*,¹ a prohibition was sought in the King's Bench against a suit in the marches of Wales for the specific performance of a covenant to grant a lease, and Coke said that it would subvert the intention of the covenantor, since he intends it to be at his election either to lose the damages or to make the lease. Sergeant Harris for the plaintiff confessed that he moved the matter against his conscience, and a prohibition was granted. This goes further than we should go now, but it shows what I venture to say has been the common law point of view from the beginning, although Mr. Harriman, in his very able little book upon Contracts has been misled, as I humbly think, to a different conclusion.

I have spoken only of the common law, because there are some cases in which a logical justification can be found for speaking of civil liabilities as imposing duties in an intelligible sense. These are the relatively few in which equity will grant an injunction, and will enforce it by putting the defendant in prison or otherwise punishing him unless he complies with the order of the court. But I hardly think it advisable to shape general theory from the exception, and I think it would be better to cease troubling ourselves about primary rights and sanctions altogether, than to

¹ 1 Roll. Rep. 368.

describe our prophecies concerning the liabilities commonly imposed by the law in those inappropriate terms.

I mentioned, as other examples of the use by the law of words drawn from morals, malice, intent, and negligence. It is enough to take malice as it is used in the law of civil liability for wrongs, — what we lawyers call the law of torts, — to show you that it means something different in law from what it means in morals, and also to show how the difference has been obscured by giving to principles which have little or nothing to do with each other the same name. Three hundred years ago a parson preached a sermon and told a story out of Fox's Book of Martyrs of a man who had assisted at the torture of one of the saints, and afterward died, suffering compensatory inward torment. It happened that Fox was wrong. The man was alive and chanced to hear the sermon, and thereupon he sued the parson. Chief Justice Wray instructed the jury that the defendant was not liable, because the story was told innocently, without malice. He took malice in the moral sense, as importing a malevolent motive. But nowadays no one doubts that a man may be liable, without any malevolent motive at all, for false statements manifestly calculated to inflict temporal damage. In stating the case in pleading, we still should call the defendant's conduct malicious; but, in my opinion at least, the word means nothing about motives, or even about the defendant's attitude toward the future, but only signifies that the tendency of his conduct under the known circumstances was very plainly to cause the plaintiff temporal harm.¹

In the law of contract the use of moral phraseology has led to equal confusion, as I have shown in part already, but only in part. Morals deal with the actual internal state of the individual's mind, what he actually intends. From the time of the Romans down to now, this mode of dealing has affected the language of the law as to contract, and the language used has reacted upon the thought. We talk about a contract as a meeting of the minds of the parties, and thence it is inferred in various cases that there is no contract because their minds have not met; that is, because they have intended different things or because one party has not known of the assent of the other. Yet nothing is more certain than that parties may be bound by a contract to things which neither of them intended, and when one does not know of the other's assent. Sup-

¹ See *Hanson v. Globe Newspaper Co.*, 159 Mass. 293, 302.

pose a contract is executed in due form and in writing to deliver a lecture, mentioning no time. One of the parties thinks that the promise will be construed to mean at once, within a week. The other thinks that it means when he is ready. The court says that it means within a reasonable time. The parties are bound by the contract as it is interpreted by the court, yet neither of them meant what the court declares that they have said. In my opinion no one will understand the true theory of contract or be able even to discuss some fundamental questions intelligently until he has understood that all contracts are formal, that the making of a contract depends not on the agreement of two minds in one intention, but on the agreement of two sets of external signs, — not on the parties' having *meant* the same thing but on their having *said* the same thing. Furthermore, as the signs may be addressed to one sense or another, — to sight or to hearing, — on the nature of the sign will depend the moment when the contract is made. If the sign is tangible, for instance, a letter, the contract is made when the letter of acceptance is delivered. If it is necessary that the minds of the parties meet, there will be no contract until the acceptance can be read, — none, for example, if the acceptance be snatched from the hand of the offerer by a third person.

This is not the time to work out a theory in detail, or to answer many obvious doubts and questions which are suggested by these general views. I know of none which are not easy to answer, but what I am trying to do now is only by a series of hints to throw some light on the narrow path of legal doctrine, and upon two pitfalls which, as it seems to me, lie perilously near to it. Of the first of these I have said enough. I hope that my illustrations have shown the danger, both to speculation and to practice, of confounding morality with law, and the trap which legal language lays for us on that side of our way. For my own part, I often doubt whether it would not be a gain if every word of moral significance could be banished from the law altogether, and other words adopted which should convey legal ideas uncolored by anything outside the law. We should lose the fossil records of a good deal of history and the majesty got from ethical associations, but by ridding ourselves of an unnecessary confusion we should gain very much in the clearness of our thought.

So much for the limits of the law. The next thing which I wish to consider is what are the forces which determine its content

and its growth. You may assume, with Hobbes and Bentham and Austin, that all law emanates from the sovereign, even when the first human beings to enunciate it are the judges, or you may think that law is the voice of the *Zeitgeist*, or what you like. It is all one to my present purpose. Even if every decision required the sanction of an emperor with despotic power and a whimsical turn of mind, we should be interested none the less, still with a view to prediction, in discovering some order, some rational explanation, and some principle of growth for the rules which he laid down. In every system there are such explanations and principles to be found. It is with regard to them that a second fallacy comes in, which I think it important to expose.

The fallacy to which I refer is the notion that the only force at work in the development of the law is logic. In the broadest sense, indeed, that notion would be true. The postulate on which we think about the universe is that there is a fixed quantitative relation between every phenomenon and its antecedents and consequents. If there is such a thing as a phenomenon without these fixed quantitative relations, it is a miracle. It is outside the law of cause and effect, and as such transcends our power of thought, or at least is something to or from which we cannot reason. The condition of our thinking about the universe is that it is capable of being thought about rationally, or, in other words, that every part of it is effect and cause in the same sense in which those parts are with which we are most familiar. So in the broadest sense it is true that the law is a logical development, like everything else. The danger of which I speak is not the admission that the principles governing other phenomena also govern the law, but the notion that a given system, ours, for instance, can be worked out like mathematics from some general axioms of conduct. This is the natural error of the schools, but it is not confined to them. I once heard a very eminent judge say that he never let a decision go until he was absolutely sure that it was right. So judicial dissent often is blamed, as if it meant simply that one side or the other were not doing their sums right, and, if they would take more trouble, agreement inevitably would come.

This mode of thinking is entirely natural. The training of lawyers is a training in logic. The processes of analogy, discrimination, and deduction are those in which they are most at home. The language of judicial decision is mainly the language of logic.

And the logical method and form flatter that longing for certainty and for repose which is in every human mind. But certainty generally is illusion, and repose is not the destiny of man. Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding. You can give any conclusion a logical form. You always can imply a condition in a contract. But why do you imply it? It is because of some belief as to the practice of the community or of a class, or because of some opinion as to policy, or, in short, because of some attitude of yours upon a matter not capable of exact quantitative measurement, and therefore not capable of founding exact logical conclusions. Such matters really are battle grounds where the means do not exist for determinations that shall be good for all time, and where the decision can do no more than embody the preference of a given body in a given time and place. We do not realize how large a part of our law is open to reconsideration upon a slight change in the habit of the public mind. No concrete proposition is self-evident, no matter how ready we may be to accept it, not even Mr. Herbert Spencer's Every man has a right to do what he wills, provided he interferes not with a like right on the part of his neighbors.

Why is a false and injurious statement privileged, if it is made honestly in giving information about a servant? It is because it has been thought more important that information should be given freely, than that a man should be protected from what under other circumstances would be an actionable wrong. Why is a man at liberty to set up a business which he knows will ruin his neighbor? It is because the public good is supposed to be best subserved by free competition. Obviously such judgments of relative importance may vary in different times and places. Why does a judge instruct a jury that an employer is not liable to an employee for an injury received in the course of his employment unless he is negligent, and why do the jury generally find for the plaintiff if the case is allowed to go to them? It is because the traditional policy of our law is to confine liability to cases where a prudent man might have foreseen the injury, or at least the danger, while the inclination of a very large part of the community is to make certain classes of persons insure the safety of those with whom they deal. Since the last words were written, I have seen the requirement of such insur-

ance put forth as part of the programme of one of the best known labor organizations. There is a concealed, half conscious battle on the question of legislative policy, and if any one thinks that it can be settled deductively, or once for all, I only can say that I think he is theoretically wrong, and that I am certain that his conclusion will not be accepted in practice *semper ubique et ab omnibus*.

Indeed, I think that even now our theory upon this matter is open to reconsideration, although I am not prepared to say how I should decide if a reconsideration were proposed. Our law of torts comes from the old days of isolated, ungeneralized wrongs, assaults, slanders, and the like, where the damages might be taken to lie where they fell by legal judgment. But the torts with which our courts are kept busy to-day are mainly the incidents of certain well known businesses. They are injuries to person or property by railroads, factories, and the like. The liability for them is estimated, and sooner or later goes into the price paid by the public. The public really pays the damages, and the question of liability, if pressed far enough, is really the question how far it is desirable that the public should insure the safety of those whose work it uses. It might be said that in such cases the chance of a jury finding for the defendant is merely a chance, once in a while rather arbitrarily interrupting the regular course of recovery, most likely in the case of an unusually conscientious plaintiff, and therefore better done away with. On the other hand, the economic value even of a life to the community can be estimated, and no recovery, it may be said, ought to go beyond that amount. It is conceivable that some day in certain cases we may find ourselves imitating, on a higher plane, the tariff for life and limb which we see in the *Leges Barbarorum*.

I think that the judges themselves have failed adequately to recognize their duty of weighing considerations of social advantage. The duty is inevitable, and the result of the often proclaimed judicial aversion to deal with such considerations is simply to leave the very ground and foundation of judgments inarticulate, and often unconscious, as I have said. When socialism first began to be talked about, the comfortable classes of the community were a good deal frightened. I suspect that this fear has influenced judicial action both here and in England, yet it is certain that it is not a conscious factor in the decisions to which I refer. I think that something similar has led people who no longer hope to control the legislatures to look to the courts as expounders of the Consti-

tutions, and that in some courts new principles have been discovered outside the bodies of those instruments, which may be generalized into acceptance of the economic doctrines which prevailed about fifty years ago, and a wholesale prohibition of what a tribunal of lawyers does not think about right. I cannot but believe that if the training of lawyers led them habitually to consider more definitely and explicitly the social advantage on which the rule they lay down must be justified, they sometimes would hesitate where now they are confident, and see that really they were taking sides upon debatable and often burning questions.

So much for the fallacy of logical form. Now let us consider the present condition of the law as a subject for study, and the ideal toward which it tends. We still are far from the point of view which I desire to see reached. No one has reached it or can reach it as yet. We are only at the beginning of a philosophical reaction, and of a reconsideration of the worth of doctrines which for the most part still are taken for granted without any deliberate, conscious, and systematic questioning of their grounds. The development of our law has gone on for nearly a thousand years, like the development of a plant, each generation taking the inevitable next step, mind, like matter, simply obeying a law of spontaneous growth. It is perfectly natural and right that it should have been so. Imitation is a necessity of human nature, as has been illustrated by a remarkable French writer, M. Tarde, in an admirable book, "*Les Lois de l'Imitation*." Most of the things we do, we do for no better reason than that our fathers have done them or that our neighbors do them, and the same is true of a larger part than we suspect of what we think. The reason is a good one, because our short life gives us no time for a better, but it is not the best. It does not follow, because we all are compelled to take on faith at second hand most of the rules on which we base our action and our thought, that each of us may not try to set some corner of his world in the order of reason, or that all of us collectively should not aspire to carry reason as far as it will go throughout the whole domain. In regard to the law, it is true, no doubt, that an evolutionist will hesitate to affirm universal validity for his social ideals, or for the principles which he thinks should be embodied in legislation. He is content if he can prove them best for here and now. He may be ready to admit that he knows nothing about an absolute best in the cosmos, and even that he knows next to nothing

about a permanent best for men. Still it is true that a body of law is more rational and more civilized when every rule it contains is referred articulately and definitely to an end which it subserves, and when the grounds for desiring that end are stated or are ready to be stated in words.

At present, in very many cases, if we want to know why a rule of law has taken its particular shape, and more or less if we want to know why it exists at all, we go to tradition. We follow it into the Year Books, and perhaps beyond them to the customs of the Salian Franks, and somewhere in the past, in the German forests, in the needs of Norman kings, in the assumptions of a dominant class, in the absence of generalized ideas, we find out the practical motive for what now best is justified by the mere fact of its acceptance and that men are accustomed to it. The rational study of law is still to a large extent the study of history. History must be a part of the study, because without it we cannot know the precise scope of rules which it is our business to know. It is a part of the rational study, because it is the first step toward an enlightened scepticism, that is, toward a deliberate reconsideration of the worth of those rules. When you get the dragon out of his cave on to the plain and in the daylight, you can count his teeth and claws, and see just what is his strength. But to get him out is only the first step. The next is either to kill him, or to tame him and make him a useful animal. For the rational study of the law the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics. It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past. I am thinking of the technical rule as to trespass *ab initio*, as it is called, which I attempted to explain in a recent Massachusetts case.¹

Let me take an illustration, which can be stated in a few words, to show how the social end which is aimed at by a rule of law is obscured and only partially attained in consequence of the fact that the rule owes its form to a gradual historical development, instead of being reshaped as a whole, with conscious articulate reference to the end in view. We think it desirable to prevent one man's property being misappropriated by another, and so we

¹ *Commonwealth v. Rubin*, 165 Mass. 453.

make larceny a crime. The evil is the same whether the misappropriation is made by a man into whose hands the owner has put the property, or by one who wrongfully takes it away. But primitive law in its weakness did not get much beyond an effort to prevent violence, and very naturally made a wrongful taking, a trespass, part of its definition of the crime. In modern times the judges enlarged the definition a little by holding that, if the wrongdoer gets possession by a trick or device, the crime is committed. This really was giving up the requirement of a trespass, and it would have been more logical, as well as truer to the present object of the law, to abandon the requirement altogether. That, however, would have seemed too bold, and was left to statute. Statutes were passed making embezzlement a crime. But the force of tradition caused the crime of embezzlement to be regarded as so far distinct from larceny that to this day, in some jurisdictions at least, a slip corner is kept open for thieves to contend, if indicted for larceny, that they should have been indicted for embezzlement, and if indicted for embezzlement, that they should have been indicted for larceny, and to escape on that ground.

Far more fundamental questions still await a better answer than that we do as our fathers have done. What have we better than a blind guess to show that the criminal law in its present form does more good than harm? I do not stop to refer to the effect which it has had in degrading prisoners and in plunging them further into crime, or to the question whether fine and imprisonment do not fall more heavily on a criminal's wife and children than on himself. I have in mind more far-reaching questions. Does punishment deter? Do we deal with criminals on proper principles? A modern school of Continental criminalists plumes itself on the formula, first suggested, it is said, by Gall, that we must consider the criminal rather than the crime. The formula does not carry us very far, but the inquiries which have been started look toward an answer of my questions based on science for the first time. If the typical criminal is a degenerate, bound to swindle or to murder by as deep seated an organic necessity as that which makes the rattlesnake bite, it is idle to talk of deterring him by the classical method of imprisonment. He must be got rid of; he cannot be improved, or frightened out of his structural reaction. If, on the other hand, crime, like normal human conduct, is mainly a matter of imitation, punishment fairly may be

expected to help to keep it out of fashion. The study of criminals has been thought by some well known men of science to sustain the former hypothesis. The statistics of the relative increase of crime in crowded places like large cities, where example has the greatest chance to work, and in less populated parts, where the contagion spreads more slowly, have been used with great force in favor of the latter view. But there is weighty authority for the belief that, however this may be, "not the nature of the crime, but the dangerousness of the criminal, constitutes the only reasonable legal criterion to guide the inevitable social reaction against the criminal."¹

The impediments to rational generalization, which I illustrated from the law of larceny, are shown in the other branches of the law, as well as in that of crime. Take the law of tort or civil liability for damages apart from contract and the like. Is there any general theory of such liability, or are the cases in which it exists simply to be enumerated, and to be explained each on its special ground, as is easy to believe from the fact that the right of action for certain well known classes of wrongs like trespass or slander has its special history for each class? I think that there is a general theory to be discovered, although resting in tendency rather than established and accepted. I think that the law regards the infliction of temporal damage by a responsible person as actionable, if under the circumstances known to him the danger of his act is manifest according to common experience, or according to his own experience if it is more than common, except in cases where upon special grounds of policy the law refuses to protect the plaintiff or grants a privilege to the defendant.² I think that commonly malice, intent, and negligence mean only that the danger was manifest to a greater or less degree, under the circumstances known to the actor, although in some cases of privilege malice may mean an actual malevolent motive, and such a motive may take away a permission knowingly to inflict harm, which otherwise would be granted on this or that ground of dominant public good. But when I stated my view to a very eminent English judge the

¹ Havelock Ellis, "The Criminal," 41, citing Garofalo. See also Ferri, "Sociologie Criminelle," *passim*. Compare Tarde, "La Philosophie Pénale."

² An example of the law's refusing to protect the plaintiff is when he is interrupted by a stranger in the use of a valuable way, which he has travelled adversely for a week less than the period of prescription. A week later he will have gained a right, but now he is only a trespasser. Examples of privilege I have given already. One of the best is competition in business.

other day, he said : " You are discussing what the law ought to be ; as the law is, you must show a right. A man is not liable for negligence unless he is subject to a duty." If our difference was more than a difference in words, or with regard to the proportion between the exceptions and the rule, then, in his opinion, liability for an act cannot be referred to the manifest tendency of the act to cause temporal damage in general as a sufficient explanation, but must be referred to the special nature of the damage, or must be derived from some special circumstances outside of the tendency of the act, for which no generalized explanation exists. I think that such a view is wrong, but it is familiar, and I dare say generally is accepted in England.

Everywhere the basis of principle is tradition, to such an extent that we even are in danger of making the rôle of history more important than it is. The other day Professor Ames wrote a learned article to show, among other things, that the common law did not recognize the defence of fraud in actions upon specialties, and the moral might seem to be that the personal character of that defence is due to its equitable origin. But if, as I have said, all contracts are formal, the difference is not merely historical, but theoretic, between defects of form which prevent a contract from being made, and mistaken motives which manifestly could not be considered in any system that we should call rational except against one who was privy to those motives. It is not confined to specialties, but is of universal application. I ought to add that I do not suppose that Mr. Ames would disagree with what I suggest.

However, if we consider the law of contract, we find it full of history. The distinctions between debt, covenant, and assumpsit are merely historical. The classification of certain obligations to pay money, imposed by the law irrespective of any bargain as quasi contracts, is merely historical. The doctrine of consideration is merely historical. The effect given to a seal is to be explained by history alone. — Consideration is a mere form. Is it a useful form ? If so, why should it not be required in all contracts ? A seal is a mere form, and is vanishing in the scroll and in enactments that a consideration must be given, seal or no seal. — Why should any merely historical distinction be allowed to affect the rights and obligations of business men ?

Since I wrote this discourse I have come on a very good example of the way in which tradition not only overrides rational policy, but

overrides it after first having been misunderstood and having been given a new and broader scope than it had when it had a meaning. It is the settled law of England that a material alteration of a written contract by a party avoids it as against him. The doctrine is contrary to the general tendency of the law. We do not tell a jury that if a man ever has lied in one particular he is to be presumed to lie in all. Even if a man has tried to defraud, it seems no sufficient reason for preventing him from proving the truth. Objections of like nature in general go to the weight, not to the admissibility, of evidence. Moreover, this rule is irrespective of fraud, and is not confined to evidence. It is not merely that you cannot use the writing, but that the contract is at an end. What does this mean? The existence of a written contract depends on the fact that the offerer and offeree have interchanged their written expressions, not on the continued existence of those expressions. But in the case of a bond the primitive notion was different. The contract was inseparable from the parchment. If a stranger destroyed it, or tore off the seal, or altered it, the obligee could not recover, however free from fault, because the defendant's contract, that is, the actual tangible bond which he had sealed, could not be produced in the form in which it bound him. About a hundred years ago Lord Kenyon undertook to use his reason on this tradition, as he sometimes did to the detriment of the law, and, not understanding it, said he could see no reason why what was true of a bond should not be true of other contracts. His decision happened to be right, as it concerned a promissory note, where again the common law regarded the contract as inseparable from the paper on which it was written, but the reasoning was general, and soon was extended to other written contracts, and various absurd and unreal grounds of policy were invented to account for the enlarged rule.

I trust that no one will understand me to be speaking with disrespect of the law, because I criticise it so freely. I venerate the law, and especially our system of law, as one of the vastest products of the human mind. No one knows better than I do the countless number of great intellects that have spent themselves in making some addition or improvement, the greatest of which is trifling when compared with the mighty whole. It has the final title to respect that it exists, that it is not a Hegelian dream, but a part of the lives of men. But one may criticise even what one reveres. Law is the business to which my life is devoted, and I should

show less than devotion if I did not do what in me lies to improve it, and, when I perceive what seems to me the ideal of its future, if I hesitated to point it out and to press toward it with all my heart.

Perhaps I have said enough to show the part which the study of history necessarily plays in the intelligent study of the law as it is to-day. In the teaching of this school and at Cambridge it is in no danger of being undervalued. Mr. Bigelow here and Mr. Ames and Mr. Thayer there have made important contributions which will not be forgotten, and in England the recent history of early English law by Sir Frederick Pollock and Mr. Maitland has lent the subject an almost deceptive charm. We must beware of the pitfall of antiquarianism, and must remember that for our purposes our only interest in the past is for the light it throws upon the present. I look forward to a time when the part played by history in the explanation of dogma shall be very small, and instead of ingenious research we shall spend our energy on a study of the ends sought to be attained and the reasons for desiring them. As a step toward that ideal it seems to me that every lawyer ought to seek an understanding of economics. The present divorce between the schools of political economy and law seems to me an evidence of how much progress in philosophical study still remains to be made. In the present state of political economy, indeed, we come again upon history on a larger scale, but there we are called on to consider and weigh the ends of legislation, the means of attaining them, and the cost. We learn that for everything we have to give up something else, and we are taught to set the advantage we gain against the other advantage we lose, and to know what we are doing when we elect.

There is another study which sometimes is undervalued by the practical minded, for which I wish to say a good word, although I think a good deal of pretty poor stuff goes under that name. I mean the study of what is called jurisprudence. Jurisprudence, as I look at it, is simply law in its most generalized part. Every effort to reduce a case to a rule is an effort of jurisprudence, although the name as used in English is confined to the broadest rules and most fundamental conceptions. One mark of a great lawyer is that he sees the application of the broadest rules. There is a story of a Vermont justice of the peace before whom a suit was brought by one farmer against another for breaking a churn. The justice took time to consider, and then said that he had looked

through the statutes and could find nothing about churns, and gave judgment for the defendant. The same state of mind is shown in all our common digests and text-books. Applications of rudimentary rules of contract or tort are tucked away under the head of Railroads or Telegraphs or go to swell treatises on historical subdivisions, such as Shipping or Equity, or are gathered under an arbitrary title which is thought likely to appeal to the practical mind, such as Mercantile Law. If a man goes into law it pays to be a master of it, and to be a master of it means to look straight through all the dramatic incidents and to discern the true basis for prophecy. Therefore, it is well to have an accurate notion of what you mean by law, by a right, by a duty, by malice, intent, and negligence, by ownership, by possession, and so forth. I have in my mind cases in which the highest courts seem to me to have floundered because they had no clear ideas on some of these themes. I have illustrated their importance already. If a further illustration is wished, it may be found by reading the Appendix to Sir James Stephen's *Criminal Law* on the subject of possession, and then turning to Pollock and Wright's enlightened book. Sir James Stephen is not the only writer whose attempts to analyze legal ideas have been confused by striving for a useless quintessence of all systems, instead of an accurate anatomy of one. The trouble with Austin was that he did not know enough English law. But still it is a practical advantage to master Austin, and his predecessors, Hobbes and Bentham, and his worthy successors, Holland and Pollock. Sir Frederick Pollock's recent little book is touched with the felicity which marks all his works, and is wholly free from the perverting influence of Roman models.

The advice of the elders to young men is very apt to be as unreal as a list of the hundred best books. At least in my day I had my share of such counsels, and high among the unrealities I place the recommendation to study the Roman law. I assume that such advice means more than collecting a few Latin maxims with which to ornament the discourse, — the purpose for which Lord Coke recommended Bracton. If that is all that is wanted, the title "*De Regulis Juris Antiqui*" can be read in an hour. I assume that, if it is well to study the Roman law, it is well to study it as a working system. That means mastering a set of technicalities more difficult and less understood than our own, and studying another course of history by which even more than our own the Roman law must

be explained. If any one doubts me, let him read Keller's "*Der Römische Civil Process und die Actionen*," a treatise on the prætor's edict, Muirhead's most interesting "*Historical Introduction to the Private Law of Rome*," and, to give him the best chance possible, Sohm's admirable *Institutes*. No. The way to gain a liberal view of your subject is not to read something else, but to get to the bottom of the subject itself. The means of doing that are, in the first place, to follow the existing body of dogma into its highest generalizations by the help of jurisprudence; next, to discover from history how it has come to be what it is; and, finally, so far as you can, to consider the ends which the several rules seek to accomplish, the reasons why those ends are desired, what is given up to gain them, and whether they are worth the price.

We have too little theory in the law rather than too much, especially on this final branch of study. When I was speaking of history, I mentioned larceny as an example to show how the law suffered from not having embodied in a clear form a rule which will accomplish its manifest purpose. In that case the trouble was due to the survival of forms coming from a time when a more limited purpose was entertained. Let me now give an example to show the practical importance, for the decision of actual cases, of understanding the reasons of the law, by taking an example from rules which, so far as I know, never have been explained or theorized about in any adequate way. I refer to statutes of limitation and the law of prescription. The end of such rules is obvious, but what is the justification for depriving a man of his rights, a pure evil as far as it goes, in consequence of the lapse of time? Sometimes the loss of evidence is referred to, but that is a secondary matter. Sometimes the desirability of peace, but why is peace more desirable after twenty years than before? It is increasingly likely to come without the aid of legislation. Sometimes it is said that, if a man neglects to enforce his rights, he cannot complain if, after a while, the law follows his example. Now if this is all that can be said about it, you probably will decide a case I am going to put, for the plaintiff; if you take the view which I shall suggest, you possibly will decide it for the defendant. A man is sued for trespass upon land, and justifies under a right of way. He proves that he has used the way openly and adversely for twenty years, but it turns out that the plaintiff had granted a license to a person whom he reasonably supposed to be the defendant's agent, although

not so in fact, and therefore had assumed that the use of the way was permissive, in which case no right would be gained. Has the defendant gained a right or not? If his gaining it stands on the fault and neglect of the landowner in the ordinary sense, as seems commonly to be supposed, there has been no such neglect, and the right of way has not been acquired. But if I were the defendant's counsel, I should suggest that the foundation of the acquisition of rights by lapse of time is to be looked for in the position of the person who gains them, not in that of the loser. Sir Henry Maine has made it fashionable to connect the archaic notion of property with prescription. But the connection is further back than the first recorded history. It is in the nature of man's mind. A thing which you have enjoyed and used as your own for a long time, whether property or an opinion, takes root in your being and cannot be torn away without your resenting the act and trying to defend yourself, however you came by it. The law can ask no better justification than the deepest instincts of man. It is only by way of reply to the suggestion that you are disappointing the former owner, that you refer to his neglect having allowed the gradual dissociation between himself and what he claims, and the gradual association of it with another. If he knows that another is doing acts which on their face show that he is on the way toward establishing such an association, I should argue that in justice to that other he was bound at his peril to find out whether the other was acting under his permission, to see that he was warned, and, if necessary, stopped.

I have been speaking about the study of the law, and I have said next to nothing of what commonly is talked about in that connection, — text-books and the case system, and all the machinery with which a student comes most immediately in contact. Nor shall I say anything about them. Theory is my subject, not practical details. The modes of teaching have been improved since my time, no doubt, but ability and industry will master the raw material with any mode. Theory is the most important part of the dogma of the law, as the architect is the most important man who takes part in the building of a house. The most important improvements of the last twenty-five years are improvements in theory. It is not to be feared as unpractical, for, to the competent, it simply means going to the bottom of the subject. For the incompetent, it sometimes is true, as has been said, that an interest in general ideas means an

absence of particular knowledge. I remember in army days reading of a youth who, being examined for the lowest grade and being asked a question about squadron drill, answered that he never had considered the evolutions of less than ten thousand men. But the weak and foolish must be left to their folly. The danger is that the able and practical minded should look with indifference or distrust upon ideas the connection of which with their business is remote. I heard a story, the other day, of a man who had a valet to whom he paid high wages, subject to deduction for faults. One of his deductions was, "For lack of imagination, five dollars." The lack is not confined to valets. The object of ambition, power, generally presents itself nowadays in the form of money alone. Money is the most immediate form, and is a proper object of desire. "The fortune," said Rachel, "is the measure of the intelligence." That is a good text to waken people out of a fool's paradise. But, as Hegel says,¹ "It is in the end not the appetite, but the opinion, which has to be satisfied." To an imagination of any scope the most far-reaching form of power is not money, it is the command of ideas. If you want great examples read Mr. Leslie Stephen's "History of English Thought in the Eighteenth Century," and see how a hundred years after his death the abstract speculations of Descartes had become a practical force controlling the conduct of men. Read the works of the great German jurists, and see how much more the world is governed to-day by Kant than by Bonaparte. We cannot all be Descartes or Kant, but we all want happiness. And happiness, I am sure from having known many successful men, cannot be won simply by being counsel for great corporations and having an income of fifty thousand dollars. An intellect great enough to win the prize needs other food beside success. The remoter and more general aspects of the law are those which give it universal interest. It is through them that you not only become a great master in your calling, but connect your subject with the universe and catch an echo of the infinite, a glimpse of its unfathomable process, a hint of the universal law.

¹ *Phil. des Rechts*, § 190.

KEENER ON QUASI-CONTRACTS.¹ II.

THE correct definition of law in its usual sense, that is, the municipal law, which is the subject matter of jurisprudence, as distinguished on the one hand from morals, from the principles of mechanical action and reaction, and from general propositions, to all of which the term has been applied, but as including on the other equity, admiralty, and ecclesiastical law, or any juridical system administered in the community, is a matter of great dispute, and per-

¹ Continued from 10 HARVARD LAW REVIEW, 227.

A word of explanation is perhaps demanded by the form of this article, which has confronted me with a larger task than I had at first comprehended. I realized from the beginning that mere iconoclasm is hardly enough, that to build is incalculably more useful than to tear down, and that if my task were to be adequately done, it must contain, besides the criticism, a positive contribution to theory. Accordingly, I planned a brief explanation (and it might have been very brief) of a theory of restitution; but in the actual writing it became necessary to formulate some common ground of accepted principles upon which the discussion could proceed. The learned author had advanced almost no proposition to which I could unqualifiedly agree, and I could think of none with which in fairness I could expect him to agree. The only recourse in this dilemma was to such propositions as were necessarily implied in the fact of argument about a common subject matter, and hence followed inevitably a consideration of the nature and reason of law and of the necessary postulates of jurisprudence. In order to bring the discussion within the limits of a magazine article, it has been condensed to the last degree of permissible compression. I can only hope that it is not unintelligible.

It is but just to acknowledge the sources of the theory herein set forth. Even as a student at school I was conscious that the doctrine of unjust enrichment needed to be supplemented by a definition of injustice, or rather of justice, a problem which I hoped some day to solve. While I was so building castles in the air, Professor Ames in class one day intimated that there might be a principle of restitution anterior to, and perhaps the basis of, unjust enrichment, and that suggestion has not been forgotten. It is, in fact, the beacon that I have followed. His bread once cast upon the waters now returns to him.

The conception of the organic constitution of society, and the conception that it is the basis of ethical obligation, have long been familiar to me from the teachings of my father, Dr. Francis E. Abbot. He has elaborated the former in a little volume entitled "The Way Out of Agnosticism" (Boston, Little, Brown, and Company, 1890), and the latter in an article entitled "The Advancement of Ethics," published in the "Monist" for January, 1895 (Chicago, The Open Court Publishing Company).

For the remainder of the theory, including the argument for the necessity of obligation as a part of the organic law in its application to persons, the classification of rights, and the discussion of special cases, I believe that I alone am responsible. Finally, it is to be added that illustrations and citations of authority have been sparingly made, not only because of limited space, but also because no proposition has been advanced as a proposition of the substantive law which seemed to require the support of authority.

haps no satisfactory definition has yet been given. Some essentials, however, may be readily determined without much discussion. For example, it will be agreed that law in this sense is a standard of conduct for human beings, and also that it is prescribed by the community through its constituted authorities. The agreement in definition would perhaps stop here;¹ but a definition containing no more than that would lack at least one element that should properly be contained in it. If municipal law in the sense indicated is to be the subject matter of jurisprudence, which is a science comparable to, and with an assured position among, the other sciences,² it must be capable of scientific treatment, or, in other words, must be rational. It might conceivably exist and be irrational; but in that event there could certainly be no science of it, and therefore no jurisprudence. It follows that in every juridical discussion in which there is anything more than affirmation on one side and negation on the other, there is necessarily implied as one of its conditions the rational character of the law.

Law, to be rational, must be founded upon a reason. If no reason should in fact exist, law would have no support but the power of the legislating community. It might, it is true, exist under such conditions, but it is also true that it would then lack certain important characteristics usually associated with law. It would lack, for example, every characteristic of permanence and stability. It might change at any moment, according to the shifting will of the community which prescribes it, and still maintain whatever validity as law it originally possessed, for by hypothesis it would have no reason, and therefore would have no reason for being one thing

¹ Compare the following definitions:—

Law is "a rule of civil conduct prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong." 1 Bl. Comm. 44.

It is "a general rule of external human action enforced by a sovereign political authority." Holland, *Juris.* 37.

"It is the body of commands issued by the rulers of a political society to its members, which lawyers call by the name 'law.'" Markby, *Elem. of Law*, § 5.

"Every positive law, or every law simply and strictly so called, is set by a sovereign person, or sovereign body of persons, to a member or members of the independent political society wherein that person or body is sovereign or supreme." Austin, *Juris.*, Lect. VI. sec. 189.

"Rules of [law] are the rules which are deemed binding on the members of the state as such, and are administered, as and because thus binding, by courts of justice." Pollock, *First Book of Juris.* 55.

Many more definitions might be cited; but these will suffice to show how great a variety of form may be combined with similarity of substance.

² See Bouv. Law Dict. *sub voc.*, and references.

rather than another. It might prescribe one standard of conduct to-day, and another to-morrow, and a third the day after. Being without a reason in fact, it would necessarily violate all reasons, and would literally be unreasonable. Unreasonableness, however, is irrationality ; and municipal law, therefore, not being irrational, must be founded upon a reason. Any definition which neglects to indicate this is, so far at least, defective.

Every juridical inquiry which purports to be exhaustive and rationally sufficient must, in view of the foregoing considerations, be pressed back to the ultimate reasons of law. Of course, any such requirement may be urged beyond legitimate bounds. A demand for ultimate reasons continually pressed would not stop short of the foundations of the universe, and would include the most recondite investigations of philosophy. This, however, is obviously unnecessary in anything but philosophy, and therefore jurisprudence, like all other special sciences, may with propriety rest upon assumed postulates. All that can be rightfully demanded is that its postulates be clearly expressed as postulates, and that they do not illicitly contain a predetermination of its conclusions. These conditions being complied with, any investigation into the postulates themselves will lie outside of law, and will properly belong with that investigation which relates to the postulates of science generally, that is, philosophy.

One of the postulates of jurisprudence has been already indicated. Being a science, and law, as its subject matter, being therefore rational, its determinations must be ascertained by the process of reason and must endure the tests of logic. The validity of the syllogism in matters juridical, as the antecedent condition of any possible juridical argument, is thus the first postulate of jurisprudence.

Another involves the mooted question of the freedom of the will. A standard of human conduct, as distinguished from necessary laws like those of mechanics, implies the possibility, together of course with the impropriety, of disobedience, and therefore of necessity implies the ability of the human being to whom the rule is prescribed to choose in the alternative between obedience and disobedience. That ability to choose is freedom, and the possession of it under the prescription of law is juridical responsibility. Freedom in the individual as the antecedent condition of juridical responsibility is thus a second postulate of jurisprudence.

These two are in fact more than postulates ; they are the necessary conditions of the science. He who condescends to argue within the field of jurisprudence must perforce take them for his data. They may be questioned in their proper place, but within that field they cannot be questioned. If, when properly questioned, they shall be ultimately sustained as valid, the possibility and actuality of jurisprudence will be vindicated ; if not, jurisprudence will prove to be but an empty name.

Assuming, however, its own real existence, and therefore its necessarily implied conditions, jurisprudence should begin by determining the reason of the law, and, in determining the reason, determine the form of the law ; that is, its several particular rules or principles. With the reason and form thus defined, a particular instance, such as the rights involved in a given litigation, can be determined by demonstrating that it is governed by some one of these principles. Thus the juridical procedure takes a form which in its lowest terms is a syllogism, wherein the major premise is the predication of a juridical principle, the minor premise is a predication that the case at bar comes within its terms as an instance of it, and the conclusion is the joinder of the two in the final judgment of the court. The ascertainment of the major premise is the province of the jurist through the process of logical reasoning ; the ascertainment of the minor premise is the province of the court through its process of investigating facts ; and the conclusion — that is, the judgment — follows, or should follow, inevitably upon these two. The jurist, then, whether a scholar writing a treatise, or a judge delivering an opinion in the course of a judicial proceeding, must first, if his major premise be a new or not hitherto recognized principle, establish his position by a correct process of reasoning. If, for example, he asserts a principle of unjust enrichment, or a principle of restitution, he must carry his proofs back to a point where he reaches only the necessary postulates or conditions of law ; or if he chooses to begin his argument at a point short of the necessary postulates, — that is, with unverified assumptions of certain results of prior logical reasoning, — he must at least make certain that his assumptions will not be questioned. Otherwise his argument will have only the weight of an assertion of his individual opinion, which in the realm of an applied law based on a system of precedents may indeed be considerable, but in the domain of reason will be naught.

The reason of municipal law must accord with the constitution of society. Even if law be supposed to be but the reflection of a higher legislating will external to society, and manifesting itself by divine revelation or otherwise, there must be either an accord or an opposition between the constitution of society and any such will. If there be an opposition, it follows that the will legislates society's ultimate destruction. Such a will, however, would defeat itself, and cannot be supposed. The assumption of jurisprudence, therefore, is that the reason of the law is in accord with the social constitution, and indeed the most superficial student would agree that that is the soundest jurisprudence which most closely harmonizes with the form of society.

The researches of scientists into the doctrines of evolution, and the wide diffusion of their results, have made the similarity between the form of society and the form of living things in general a matter of common knowledge. Both are recognized as organic; but the full content of that term is by no means clearly understood. The discovery bears most important consequences, which cannot be appreciated, however, until the essential organic nature is more fully defined. It would be apart from my subject to enter into all the complicated analyses that are involved in the organic idea, but one fact, which bears immediately upon the nature of law, may be indicated at once, and that is, that within the organism there exists a most complete mutual dependence between part and part and between part and whole, between organ and organ and between organ and organism. If one organ fails to perform its functional office, the organism as a whole suffers, and likewise the other organs. On the other hand, if the organism as a whole fails in its general organic activities, the failure intimately affects every organ. Thus, if in the animal any one organ should fail in its functional activity, if the heart should cease to supply blood to the other organs and to the general system, the animal would languish and die, and in the general death would be involved the death of all the organs. Again, if the heart should fail to furnish blood to any one organ, like the limbs, it would become useless, and as a limb would die. So, too, if the whole animal should refuse to carry on its general activities, or should cease to provide sustenance for its several organs, they would become useless from lack of exercise or from inanition. In fine, the animal and its organs subsist only in a general relation of interdependence of part and

part, and of part and whole, — a relation which may fitly be designated by one word, reciprocity. Reciprocity, then, indicates a unitary principle with a twofold application, according to the terms of the relation, — the reciprocity between part and part, and the reciprocity between part and whole. In each application it is to be also observed that it possesses a double aspect. It means the necessity of, *first*, the integrity of the organ in the exercise of its own organic functions, and, *second*, its co-operation with the other organs and with the whole organism in the exercise of their several organic functions.

The principle of reciprocity so ascertained and defined in the organism is capable of the most precise and exact application to the social body, which is itself an organism. In the new application, the individual takes the place of the organ, and the community at large takes the place of the organism as a whole. With this interchange of terms, we find a mutual dependence between the several individuals on the one hand, and between each individual and the community at large on the other, and we find also the double aspect of the relation in the necessity of freedom to each individual in the performance of his own function, that is, in the free development of his own life, and in the necessity of co-operation by each individual with others in the performance of their functions, that is, in the free development of their lives. The perception, in a more or less crude form, that this reciprocity is a principle of the social order, is one of the oldest heritages of thought in the possession of our race. It dates back certainly as far as the well known fable of the belly and the members, as told in the ancient days of Rome, and the separate aspects of it have caused the difference between the egoistic and the altruistic schools of morals. One set of philosophers seized upon its selfish aspect in the necessity of individual freedom, and, making the individual's happiness the ultimate goal, became the egoistic school in all its manifold forms. Another seized upon its disinterested aspect in the necessity of co-operation among the members of society, and, making the community's happiness the ultimate goal, became the altruistic school in its equally manifold forms.

A principle of reciprocal dependence, however, is not enough by itself to constitute the basis of a rationally sufficient theory of morals. Taken by itself it is not in any sense a law, that is, a rule of action, because it imports neither a necessity nor an obliga-

tion of conformance. To be the basis of moral theory it must be applied to morally responsible beings, to beings, that is, endowed with a freedom of initiative. It cannot, therefore, as to them be a rule of necessitated action. Moreover, it cannot without proof be assumed to be a rule of obligatory action, because that involves the unverified assumption of the existence of a moral obligation. It is true that obedience to the principle of reciprocity is essential to the maintenance of the social order, and even, in a large aspect, to the existence both of the individual and of society; but to prove so much is to prove simply that reciprocity is a mere condition from which the utmost inference that can be drawn is that it is to the interest of society and of its members to conform to their conditions of existence. It is an invalid inference that such conformance is obligatory. If individuals refuse to conform, they will, to be sure, their own destruction and the destruction of society; but there is nothing in mere reciprocal dependence to forbid their willing such destruction, except the destruction itself. There has been much misconception on this matter, and in many ethical theories, notably the utilitarian, the effort to convert a mere mutual dependence between individuals, without more, into an obligation of altruism has been most strenuous. It has been a fruitless task, however, and those who have tried it have not permanently satisfied the demands of reason. Unless therefore more inheres in this relation than has yet appeared, neither the necessity nor the obligation of conformance obtains with respect to the conditions of reciprocity. A more careful inquiry into the nature of law is necessary.

In a mere static universe, wherein all things should be fixed and nothing should change, an intelligence of sufficient capacity might supposably discern certain formal relations, such as those of position, number, and likeness; but these are all that could be discerned, and all that would be intelligible. No one form of such a universe would be more intelligible than another. Even if it were arranged in an order of stellar systems, with suns, moons, and planets, with perhaps forms of trees, mountains, and temples, these would be no more intelligible than irregular forms for which no name exists. There would be only these spatial and numerical relations, which could be as easily measured in the one case as in the other. Such a universe, however, could not in any part of it be seen, or heard, or tasted, or perceived by any physical sense,

since all sense-perception is based upon vibratory motions of matter, which are inconsistent with the hypothesis that all is static. Indeed, it could not be perceived even by an act of pure intelligence, for it is a violation of our hypothesis of unchangeability to suppose that in such a universe a perceiving mind could exist, since perception involves action of the perceived on the perceiver and reaction of the perceiver to the perceived, and action and reaction involve change. Such a universe, then, might conceivably exist, but it could never be known to exist.

Introduce change into such a universe, but change only. The resulting conception of a universe of constant change is not new; it existed in the ancient notion that the universe is a mere fortuitous concourse of atoms. Now this conception involves the notion of time, for change means a succession of events marked in time; but this is the only addition to our prior conception. There is at any rate, so far as the hypothesis yet permits, no possibility of cause and effect. The impact of one body upon another would produce no change in either. Change might, or it might not, follow; but, even if it did, by hypothesis it would not be the effect of the impact, and would not therefore be produced by it. Sensuous perception of such a universe would be as impossible as in a static universe, for all forms of sensuous impression involve, not only vibration of matter, but also effects of vibration. That is, the vibrating matter must cause the perception in the perceiver; but cause and effect are excluded from our hypothesis. By a parity of reasoning, intellectual perception is impossible, because perception of all kinds involves the very causal relation which is rejected from our supposition. Like the purely static universe, therefore, a merely flowing universe might conceivably exist, but it could never be known to exist.

From these considerations it follows that, in order that the external universe should be known at all as a self-subsisting reality, there must be something contained in it beyond the mere flux of hurrying atoms. There must be such a relation between the parts that one change necessarily produces another comparable to, and measured by, the former. A relation of this character we call a law,—a law of causality or of necessity. Such a law is inseparably involved in the act of knowing, and therefore knowledge of the mere existence of an external universe indubitably proves the existence of a law of necessary causality.

Let us now introduce into such an external and intelligible universe, governed as we have seen by a law of necessary causation, human beings endowed with a freedom of initiative. Such beings, so far as they possess a material constitution, will be subject, of course, to the necessary laws of matter. They are, however, capable, under our hypothesis, of themselves setting in motion chains of causes and effects which have no antecedent cause other than the volition of the beings themselves. This is the meaning of freedom. These volitions, however, considered alone, have no explanation, so far as we have yet supposed. They are mere whims, of which nothing more is to be known than is to be known of the unconscious and unregulated motions of infancy. Indeed, that is all they are. If, however, we further predicate intelligence of such beings, a new but real element of intelligibility is added, to wit, the thought or intention manifested in their volitions.

The mere supposition of intelligent and freely volitional human beings, however, bears no very important consequences. Such beings would be wholly unrelated, except in three particulars. They are of course under the relations of space, time, and the other purely formal relations; they are subject to the law of causality; and they may voluntarily relate themselves to each other by joining in common purposes; but with that their relatedness ends. Two of them, for example, of opposite sex, might voluntarily cohabit and beget children. The children would be the effect of their parents' cohabitation, and the parents would be the cause of the children; but any further relation would depend solely upon the volition, not of the parents only, but of the children as well. To suppose anything more is to violate our hypothesis. Under such conditions, there could be no family in any legitimate sense of the word. So, too, society would not exist otherwise than as a mere social compact, dependent upon the actual will of each individual member, and since the possibility of a will to unite necessarily implies the possibility of a will to disunite, it would have no elements of continuity superior to the changing desires of its members. The form of such a society would be at any given moment but the form of the conjoint wills of its members. Those wills, however, would change with no more reason than the shifting desires of those at the time composing the social body, which therefore would lack every element of stability and of permanence. It would be particularly true that there would be no continuity of

form in the change from one generation to the next, and historical unity would be impossible.

From these considerations, it follows that human beings to exist at all in a social body possessing a unitary form must exist according to some principle of unity apart from their volition and yet affecting it. It must be a principle relating free activities, but not necessitating their action. The difficulty is to reconcile such a principle with the freedom of the activities which it relates. It must be on the one hand universal, and on the other consistent with the possibility, in fact the actuality, of non-conformance. On the one hand, if it were not universal, it would be only occasional, and not therefore a general principle at all, and on the other hand, if conformance were a necessity, there would be no freedom in the individual. The reconciliation of these two can be found only in a universal principle, non-conformity to which is possible, but conformity to which is *obligatory*, that is, in a law, not of necessity, but of obligation. Whatever, therefore, may be the unitary principle of society, it involves an obligation of obedience, without which society is but a meaningless name.

In the foregoing discussion of necessity and obligation, it is to be noted that the argument falls short of actually proving the existence of either. It succeeds, supposing it to be valid, in showing only that necessity and knowledge of the universe as an existent reality on the one hand, and obligation and knowledge of society as a unitary body on the other, are inseparably connected terms, and that if one term in each pair is true, the other is true also. Now, as a matter of fact, both the knowable reality of the external universe and the unity of society except as a mere social compact have been denied, the former by certain despairing philosophers whose sect is not even yet extinct, and the latter by the early sociologists whose theories are at the present time substantially rejected. To discuss these problems is not within the province of jurisprudence, and I shall assume, therefore, without argument, both the reality of the universe and the unitary character of society, and hold them as proof of both necessity and obligation. But more than that: they constitute, like rationality and freedom, the necessary postulates of jurisprudence as a science, without which it cannot exist except as a figment of the imagination. If human beings are not causes, they cannot be juridically responsible for any effects. If they are not united in bonds other than those

of their voluntary forging, juridical responsibility is nothing but the force of the majority constraining the minority, and jurisprudence has no place except as a science of the will of the majority, which may change as it chooses, and therefore cannot be the basis of a rational science. Causality as the antecedent condition of juridical responsibility is thus the third postulate of jurisprudence, and obligation as the antecedent condition of juridical relation is its fourth postulate.

Having ascertained then that, whatever may be the principle or universal element which makes society society, it must necessarily have the sanction of moral obligation, and having ascertained that the principle of reciprocity is that unitary principle of society, we must conclude that the principle of reciprocity is itself a principle of moral obligation, or in other words is a moral law. Indeed, in looking back upon our analysis, we can see that it is insufficient if it contents itself with finding that the condition of social existence is summed up in a mere interdependence of individuals upon each other. The condition is more than that: it involves necessarily an obligation. Society and the individual alike are incapable of existence except under law. The possession of freedom is unintelligible except as in and with responsibility for its exercise, and to speak of a free and intelligent but irresponsible being is in truth to speak a contradiction in terms. If, then, my argument is correct, the principle of society is the principle of reciprocity, and the principle of reciprocity is a law of obligation.

Two things are to be observed about this law of reciprocity. It does not lose its quality as a condition in becoming a law, since it could not be that disobedience to it as a law should be fraught with less serious consequences than disobedience to it as a condition; and again its content as a law, the thing that it prescribes to be done, is precisely the same as the positive content of the organic law in the non-personal organism and in the organic universe. It is in fact the organic law of the universe shorn of its quality of unconscious necessity, and given to the hands of freely volitional and intelligent beings as a trust obligation to be consciously obeyed. It is thus that the evolutionary nexus between man and the lower organic forms, historically actual as we now believe it to be, is also rationally possible, if not rationally necessary. In the process of evolution the organism becomes person; in the same process the organic law becomes personal and the necessary becomes obligatory.

Reciprocity, then, is a law of obligation which creates ethical relations between two or more persons, or between persons and society. These relations may be regarded from the point of view of either term. From one aspect they are usually called obligations, and from the other rights. The two words are thus but antithetical names for one and the same relation. In the self-regarding or egoistic aspect the relation concerns the free self-development of each member of society. To interfere with that is a breach of the obligation of reciprocity, which, so far forth, is to respect such freedom and refrain from interfering with it. The obligation being from the other view a right, each member of society has a right of free and uninterrupted self-development, which may for shortness be called his right of freedom. In its other regarding, or altruistic aspect, the obligation of reciprocity concerns the assistance due from each member within the social body to his fellows and to society, and due from society to each of its members. To refuse to render such assistance is a breach of the obligation of reciprocity, which, so far forth, is to render such assistance. Each member then has the right to such assistance, which may for shortness be called a right to co-operation. Thus two great classes of ethical rights are at once established.

It may be noted in passing that the fullest performance of the altruistic obligation depends upon the fullest enjoyment of the egoistic right, and, conversely, that the fullest enjoyment of the egoistic right depends upon the fullest performance of the altruistic duty. It is only upon the condition that the individual and society are possessed of their utmost powers that they can render efficient aid to others, and it is only upon the condition that others assist them that they can themselves attain their highest development. It is thus in a very real sense true that the individual's highest self-development is a duty which he owes to others, and that their co-operation with him is their right which he must respect. In a manner, therefore, the principle of reciprocity returns upon itself. These considerations bring more clearly to view the essential unity of the principle. Egoism and altruism, instead of being a conflicting duality of opposing forces, are harmonized into one law of distinguishable but inseparable aspects. Finally, be it observed, the organic relations which this principle involves would not be enlarged by showing the individual to be a member of another than the social organism. The same reasoning would

hold true, and would result, not in a new definition of the individual's ethical status, but in the discovery of new terms for relations already clearly defined. His right and duty would be the same, but those from whom they are due and to whom they are owed might be different.

Human beings are more than organisms ; they are persons, with the power of freely conceiving purposes and of freely communicating them. In this power of conceiving and communicating purposes lies the power of promising their fulfilment. Now it requires no argument to show that upon the general fulfilment of promises depends the whole fabric of society. The vast and intricate system of commercial credit is but one empirical proof of this proposition. If the usual custom were to break promises instead of keeping them, three generations would suffice to restore the civilized world to utter barbarism. The social interest lends, therefore, as one exemplification of the law of reciprocity, to every promise the sanction of organic obligation. The promise, in other words, being a voluntary relation established between members of an organism which, without the organic law, would be optional and terminable at will, is with it affected with the organic character, and is therefore obligatory. Such obligations, of course, are defined by the parties, and are precisely determined by the terms of the consent, and may therefore be as various as thought itself. Their variety, however, does not defeat their obligatory character, and promises are to be classed as a third group of ethical relations.

The rights thus deduced from the organic idea may be classified as follows : —

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|----------------|---|---------------------------|
| Organic . . . | { | A. Right of freedom. |
| | | B. Right to co-operation. |
| Personal . . . | | C. Consensual rights. |

This classification of rights is exhaustive. They are deduced from man's relations to the external universe and from his own internal constitution, and these are the only sources from which such deductions can be drawn. It remains to consider the relations of law to ethics, and thence to deduce a classification of legal rights.

The law of reciprocity commands society as well as the individual. Society has its right of freedom, and also its duty of co-operation. Its organization in the form of states and nations is but the means to these two ends, and in particular the establishment of tribunals of justice is a means both to its self-development

and to the performance of its duty. In punishing crimes and misdemeanors, and in adjudicating between citizens, it is therefore but obeying its organic duty and enforcing its organic right, as these are defined by the law of reciprocity. No state fails utterly in this function. To a greater or less extent, with a greater or less degree of intelligence, and with a greater or less approximation to the ethical standard, every community that ever existed has administered some form of justice, and maintained some forum for its administration. Indeed, there is no criterion whereby to judge the progress of a community in civilization which is more fundamentally sound than the success it has attained in the administration of justice. The ethical law is thus at once the reason of the municipal law and the substance of its commands.

Ideal justice would obtain were the state able to lend its sanction to the ethical law in its entirety; but that is obviously impossible. It is still true, however, that the state should proceed in its duty so far as its powers will permit, and this is substantially recognized in the maxims of the law. *Ubi jus, ibi remedium*.¹ In any new case, therefore, the investigation into the limits of law should properly resolve itself, supposing the ethical status to be clearly ascertained, into an investigation of the limits of judicial power. In view of these considerations, I venture to hazard this definition: *Municipal law is the command of society through its constituted authorities, founded upon the ethical law of reciprocity as the reason of its command, and, to the extent of its power, re-enacting that law as the standard of conduct for its citizens.*²

¹ An interesting and perhaps the latest case indicating that this is the just attitude of the courts is *Kujek v. Goldman*, 150 N. Y. 176.

² It will be observed that this definition approaches very closely to the definition of Blackstone, "a rule of conduct prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong." 1 Comm. 44. The criticism of Christian upon the final clause of this definition, that, if right and wrong are referred to law, the proposition is tautological, and that, if they are referred to an external standard, it is not true in fact, since the law prohibits many things that ethically are right, will occur to every reader. 1 Comm. 44 (Sharswood's ed.), n. 8. This criticism proceeds upon a probably mistaken notion of the meaning of the obnoxious clause. What Blackstone probably intended to indicate by it is the general command of the municipal law to be ethical, which necessarily accords with the ethical law. He probably did not intend its particular commands to do or not to do particular acts, — commands which may not be, and in fact often are not, ethically right. It is this general command which my own definition is intended to indicate. I have added the clause "founded upon the ethical law of reciprocity as the reason of its command," as expressing more fully the rational nature of the command, and have used the phrase "society through its constituted authorities," instead of "the supreme power in the

This conception of law renders possible a simple and intelligible classification of legal rights upon the basis of the previously ascertained ethical rights. It is a strong confirmation of the classification which I shall now offer, that it conforms with great accuracy to the usually accepted classifications.

In the first place comes the right of freedom. As has been seen, it is a negative right, requiring forbearance rather than active doing. It embraces within its scope, therefore, the whole class of torts. Assaults upon the person, property,¹ or reputation are but instances of its violation. The conception of this right as a subject of legal protection has greatly advanced within late years. The real need now is that all the various classes of torts, such as assault and battery, nuisance, libel, and the like, should be recognized as but separate instances of one unitary right. Much has been accomplished in this direction already,² and the right of freedom may justly be classed among the citizen's legal rights.

The duty of co-operation follows after the right of freedom. It is positive in its nature, requiring active performance rather than forbearance. The citizen owes it to his fellow citizens to be generous with his possessions and kindly and charitable in his speech. He owes it to the state to devote a proportionate share of his time to his civic relations, and a proportionate share of his property to the support of the civic institutions.

Duties which are owed directly to the state are sometimes made the subject of the state's express command. They do not constitute direct legal relations between individuals, however, and are not therefore within the purview of this article, which is concerned only with the rights of individuals *inter se*. Duties of the latter kind, running to individuals directly, have very rarely received the enforcement of law. They involve too many considerations of re-

state," because the command is the command of society as an organized whole, and not of any part of it. With these two exceptions, the substance of the definition is the same, although there is still some variance in phraseology.

¹ I once ventured upon an analysis of the legal notion of property in an article entitled "Police Power and the Right to Compensation," 3 HARVARD LAW REVIEW, 189. It is proper to add, that that article was written before I had arrived at the present theory of torts. Subsequent consideration only confirms me in the views then expressed.

² See the able and conclusive article of Messrs. Warren and Brandeis in 4 HARVARD LAW REVIEW, 193. Also the case of *Schuyler v. Curtis* in its various stages: on motion for preliminary injunction, 27 Abb. N. C. 387; on appeal from injunction order, 64 Hun, 594; on the merits at the trial, 30 Abb. N. C. 376; on appeal from the final decree, 147 N. Y. 434.

mote and difficult character to receive adequate handling by any merely human tribunal. The obligation of assisting other individuals in their private pursuits, as, for example, by giving alms, must necessarily lie largely, if not entirely, within the sphere of individual determination, because it involves an element of self-sacrifice. Some self-sacrifice is demanded from each member of society, but what and how great it shall be is left to the conscience of the individual. Others cannot decide such a question for me, nor I for others, and even the most perfect and enlightened jurisprudence would refuse to enter upon such an undertaking. As a general rule, then, it is true that the state has refused to lend its sanction to the duty of co-operation as between its citizens.

There are certain notable exceptions, however. The state may, in pursuance both of its right and of its duty, declare that certain acts are so important to the general welfare that a specific obligation to perform them should be laid upon its citizens, and hence result certain statutory duties, such as the duty of abutting owners to keep their sidewalks clear of snow. The act of the legislature decreeing them is but declaratory of the previously existing ethical obligation. If it were not declaratory, it would be without the justification either of the right of the state or of its duty, and therefore in contradiction of its own organic law. In all communities, however, mistakes may and do occur, and it sometimes happens that really unjustifiable laws are in fact promulgated. Such laws have the exact force of the state behind them, and nothing more ; but to that extent they become for the citizen real rules of conduct, and must be accepted as part of his legal duties. Such duties, as has been said, are commonly owed to the state ; but there are instances where they are owed by one citizen to another. Such a case is that of half-pilotage fees, mentioned by Professor Keener. A California statute imposed upon masters of vessels the duty of employing pilots in the harbors of the State, and provided that, when a vessel was spoken by a pilot and his services were declined, the master should nevertheless pay him half his usual fee.¹ The justification of such a statute lies in the public need. It in effect imposes a tax upon the individual for the preservation of harbors and of human life, and it supports quasi-public officers to secure those two objects.

A curious instance of such a right existing independently of

¹ *Steamship Co. v. Joliffe*, 2 Wall. 450 ; Keener on Quasi-Contracts, 16.

statutes is the so-called "spurious easement" allowed in England, whereby the owner of a parcel of land could, without a contract, call upon his neighbor in certain circumstances to maintain the fences between their lands. If the right is sustainable on theory, which seems very questionable, it imposes upon the defendant a positive, not a negative duty. It seems to be due to custom.¹

As has been said, these altruistic duties involve an element of self-sacrifice, and it is doubtful if the courts have the power of their own motion to require any such sacrifice, though of course, if the state should command it by statutory enactment, the courts must afford such remedies as they can. Even the legislature, however, should be, and is, chary of issuing such commands, and the condition of them should lie in a direct public need; and, so far as I am aware, with the exception of the spurious easements just mentioned, the courts in English-speaking jurisdictions have never undertaken to enforce a positive duty of this character without legislative support.² That they may recognize the existence of the duty of co-operation without attempting to compel its performance is, however, quite clear. A very striking and just instance of this is the case of Henry Eckert, who tried to save a child's life at the risk of his own by snatching it from in front of an advancing train, and was killed in the attempt.³ The court rightly overruled a plea of contributory negligence in an action by his administratrix for damages. No court would have compelled him to take such a risk; but, when it was taken, the court was compelled to recognize its high ethical character, and the consequent legal right to run it, when, without such a reason, it would be legally unjustifiable. There are undoubtedly other instances of the recognition or enforcement of the right to co-operation, but these will suffice to show the existence of positive duties owed by one citizen to another. So far as they are enforced by law, they constitute legal rights. Like the negative rights, of which a violation is a tort, they should strictly be regarded as but instances of one unitary right. So regarded, each citizen has, under many limitations and circumscriptions, a legal right to co-operation.

Consensual rights are almost uniformly enforced. I have purposely used the word consensual instead of contractual, because

¹ *Lawrence v. Jenkins*, L. R. 8 Q. B. 274; s. c. 2 Gray's Cas. on Prop. 324.

² See, however, the discussion of the nature of contribution, *post*, p. 506.

³ *Eckert v. Long Island R. R. Co.*, 43 N. Y. 502 (1871).

there are many non-contractual rights which nevertheless receive abundant protection from the courts. A contract requires not only consent, but also a consideration. The beneficiary of an express trust has usually given no consideration whatever for his rights. They are, however, created by consent, are defined by consent, are terminated by consent, and withal are most favored in law. Consensual rights therefore are the third class of legal rights.

If the foregoing arguments have been sound, the following is an exhaustive classification of the legal rights which may belong to any individual :—

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| Organic | . | . | { | A. Right of freedom. |
| | | | | B. Right to co-operation. |
| Personal | . | . | | C. Consensual rights. |

It remains now to consider the effect of a breach of right, and it is to be observed in the first place that a breach does not terminate a right, because if it did it would be possible for any person or society to terminate its obligation (the correlative of the right) by a mere refusal to perform, and obedience would in effect become merely optional. Such a result is inconsistent with our premise, that obedience is obligatory, not optional. A right then can be terminated or destroyed as between the parties only by the consent of him who owns it, and the effect of a breach is, not to destroy the obligation, but, at the most, to change it.

The organism, like the chemical molecule, is a system of delicately adjusted and balancing parts, and a breach of a right is therefore the disturbance of a position of organic equilibrium between the parts of the organism. Justice, then, lies originally in the maintenance, and secondarily in the restoration, so far as possible, of that position of equilibrium. The duty of him who commits a breach of obligation is therefore to put the injured person as nearly as possible into his former position. Such a duty is merely secondary, arising only upon a breach of some one of the original obligations. It is the secondary obligation, however, that is usually enforced by the courts, since it is rarely the case that they are able to prevent the breach of a primary obligation. It is sometimes accomplished, however, as by an injunction against a threatened trespass; but, with exceptions of this character, in all contentious cases the judgment of the court is a declaration of the secondary duty of the defendant, reinforced by the power of the court through its judicial process to compel performance, and

the obligation upon a judgment is but this secondary obligation so judicially defined and sanctioned.

The remedy for a breach of a right is that judgment which the court will render, and the possible remedies for each class of rights are readily ascertainable. For reasons of convenience, I shall consider first the duty of co-operation.

The right of co-operation is a positive right, requiring active performance, and a breach of it is an omission. In the case of a positive right the court may compel the defendant to repair his omission by doing the very act which the obligation prescribes and which the defendant has left undone. The obligation to maintain fences was thus specifically enforced at common law by the writ *de curia claudenda*, which required the defendant actually to build the fence.¹ This remedy may be called specific reparation of the breach. There is another and more usual remedy, however, in the award of damages, which by antithesis may be called reparation in value. The damages are of course the amount of money necessary to put the plaintiff in a position as good pecuniarily as that which he would have occupied had the obligation been performed. The distinction between specific reparation and damages obtains even when the obligation is to pay money. If the court should order the defendant to make the payment himself, and should enforce its mandate by the process of contempt, that would be specific reparation. If it should undertake to make the payment itself out of the defendant's property by a writ of execution, that would be damages.

The right of freedom is a negative right, requiring forbearance, and a breach of it is a fault of commission. Specific reparation, then, in the complete sense of doing that which the obligation prescribes, is of course impossible. The defendant's obligation was to refrain from acting; but having broken his obligation by acting, he cannot so turn back the hands of time as to undo his act and then refrain from acting. Damages, however, or reparation in value, are quite possible, and are in fact the most usual remedy.

There is a remedy other than reparation possible in some cases of torts. Reparation looks only to the plaintiff's loss; but in some cases the defendant acquires something by the wrong, and in that case he must restore what he has received. Thus, if the defendant commits an assault and battery, the plaintiff suffers damage, but the defendant has acquired nothing. On the other hand, if the

¹ *Lawrence v. Jenkins*, L. R. 8 Q. B. 274; s. c. 2 Gray's Cas. on Prop. 324.

defendant converts property of the plaintiff to his own use, the plaintiff not only loses the property, but the defendant gains it. Now the defendant's original obligation was to refrain from interference with the property, and this obligation still continues. His continued retention is a continued breach of this duty, and there is but one way in which he can end the breach, and that is by returning the property in the very form in which he took it. His negative obligation not to interfere is thus transformed by the breach into a positive duty to restore. This secondary obligation is frequently enforced by the courts. The action of replevin as common in American jurisdictions is one mode of enforcement, and the equitable remedy of declaring the defendant a constructive trustee of the property and directing him to return it is another. This may be called specific restitution.

There are other cases in which the plaintiff, because what the defendant has gained is lost, destroyed, or for some other reason is incapable of restitution, is unable to have specific restitution, and there are still other cases in which he may not care to have specific restitution, even when it is possible. In such an event, he is allowed to recover the pecuniary value of what the defendant has received. This may be called restitution in value as distinguished from specific restitution. Usually, of course, the measure of restitution in value would equal the measure of damages, but it might at times differ considerably. Damages would be computed solely on the plaintiff's loss, without reference to what the defendant should profit; but restitution in value would be measured by the worth of the property in the defendant's hands, which might be greater or less than the plaintiff's loss.

It remains to consider the modes of remedy upon the breach of a consensual right. These rights may in some cases be positive, requiring the defendant to act, and in them specific reparation is often possible. Such a remedy is common under the name of specific performance. Reparation in value, or damages, is possible in all cases, and is in fact the most common remedy. Further discussion of these remedies is not necessary.

In all instances of a breach of right, the plaintiff may forgive the wrong, or, to use the more technical term, may waive it. The essence of such an act, however, is that the defendant in effect denies the right, and the plaintiff yields it up. It is the conjoint action of the two, therefore, which destroys it. This is as true of

consensual rights as of others. A breach is, so far as the defendant is concerned, inconsistent with his obligation, and the plaintiff may take him at his word and himself regard the right as non-existent. This in the case of contracts is called rescission. In some cases, however, the right is called into existence upon the delivery from the plaintiff to the defendant of something valuable in return for the right, and what is so delivered — which, it is to be noted, may be either property or services — is called a consideration. An undoing of the obligation will in such a case be complete only when the defendant returns the consideration which he has received. If under such circumstances the defendant both refuses to perform his obligation and also to return the consideration, the two positions are inconsistent, being at once an affirmation and a denial of the contract, and they immediately afford the plaintiff an alternative. He may enforce the obligation by way of either specific reparation or damages, as the case may be, or he may declare the obligation at an end and recover his consideration. The latter, then, is alternative to damages, and between the two the plaintiff has an election.

The right of rescission is not limited to a recovery of the consideration, in the strict and technical sense of the word in our law. It extends to whatever property or advantage the defendant has received from the plaintiff upon the faith of the obligation, even though it cannot in strictness be called a consideration. Whatever it be called, upon a rescission of the obligation, the defendant is under a duty to restore what he has gained or its value, and the plaintiff has his remedy of restitution. The gain may be restored in its original specific form, in which case the plaintiff will have specific restitution, or its worth may be restored, in which case the plaintiff will have restitution in value.

These various possible remedies may now be re-grouped, not according to the rights from which they spring, but according to their form and quantitative value, and this re-grouping may be diagrammatically represented as follows : —

A. REPARATION.

1. *Specific.* (Possible if the obligation is positive.)
2. *In Value.* (Possible in all cases.)

B. RESTITUTION.

1. *Specific.* (Possible if the defendant has obtained pro-

perty of the plaintiff by means of a tort, or upon faith of a consensual right, and the property can be restored.)

2. *In Value.* (Possible if the defendant has received a benefit from the plaintiff by means of a tort, or upon faith of a consensual right.)

The resemblance between restitution in value upon the breach of a consensual obligation and the similar restitution upon a tort is purely quantitative. It is so exact, however, in that particular that the two forms of the obligation may be conveniently, though perhaps not very scientifically, treated together. In every case of restitution in value, inspection shows that there are four conditions to be satisfied. In the first place, the plaintiff must have lost something; in the second place, the defendant must, have gained something; in the third place, that which the plaintiff has lost must be identically that which the defendant has gained; and, in the fourth place, there must have been a breach of right, which may be a breach of a consensual right or a tort. If any of the first three conditions do not obtain, there is nothing to restore, and if the fourth does not obtain, there is no duty, since the plaintiff cannot ask a remedy where there is no wrong.

The principle of restitution in value, by reason of its rather unscientific character, probably cannot be stated in a form that is satisfactorily concise; but perhaps the following will serve: *Upon a tort or upon the breach of a consensual obligation the defendant shall restore the value of whatever the plaintiff has lost and he has gained.*

This principle of restitution in value, or, more shortly, restitution, I believe to be substantially what is intended by Professor Keener in his doctrine of unjust enrichment. That doctrine, however, has been applied by him to many cases which cannot come under the head of restitution, and it is necessary now to ascertain the differences between the two.

In the principle of unjust enrichment, three elements must obtain, — expense of the plaintiff, enrichment of the defendant, and, finally, injustice. Now, it is clear that expense of the plaintiff and enrichment of the defendant in the one principle are identical with loss by the plaintiff and gain by the defendant in the other. The condition of restitution, however, that what the plaintiff loses must

be the identical thing that the defendant gains, does not appear in the doctrine of enrichment, nor does it appear that by injustice is intended merely a tort or a breach of a consensual obligation. In every case, however, where, in addition to the conditions contained in the doctrine of enrichment, it is also true that the injustice lies in a breach of a consensual obligation or in a tort, and that the property or service whereby the defendant is enriched is also the property or service which the plaintiff has lost, the principle of restitution is applicable. The cases cited and discussed by the learned author in his chapters entitled "Waiver of Tort"¹ and "Obligation of a Defendant in Default under a Contract,"² almost uniformly fall within the lines of both doctrines, and so far as that is true I am glad to avow myself in accord with the learned author. A particular discussion of such cases, therefore, is not necessary. It is in the discussion of cases in which the two principles differ that the greatest intellectual profit and the clearest mutual understanding lie, and therefore, ungracious though it seem, it is on the differences rather than on the agreements that stress will be laid.

As has been seen, the word unjust may have a wider scope than merely the breach of the obligations enumerated in the principle of restitution. It behooves the careful critic, therefore, to analyze the distinction between the two. Now the learned author has attempted no definition of injustice. This cannot be regarded as otherwise than a very serious and fundamental omission by a writer who is endeavoring to establish a new principle based upon justice. It necessarily invalidates as an argument every discussion upon which he enters, simply because it deprives him of a major premise. There are for him no criteria of the general class of unjust acts whereby to determine a given case. We may admit, for argument's sake, that a tort is an unjust act; but if some other reader less tolerant should refuse to make the admission, how could the author substantiate his position that one who enriches himself by a tort is unjustly enriched? This is, of course, an extreme case, and the learned author may say, with some justice, that he had no intention of writing a book on jurisprudence in general, and that he took certain results of jurisprudence as fully determined. This plea will not avail him, however, in cases where there are no such fully determined results. Thus he concludes that the plaintiff should be allowed to recover from the defendant in a case where

¹ Pages 159-213.

² Pages 267-314.

the plaintiff has rescued the defendant's property from destruction without request (the defendant being quite ignorant of the danger), but expecting nevertheless to be compensated for his services.¹ Having no principle of justice, the author can only say that it seems to him unjust that the defendant should not pay for the benefit received, and in fact that is all that he does say. He does, it is true, argue that the preservation of property is beneficial to the public as well as to the owner, and that therefore the public interest should weigh in the plaintiff's favor; but he destroys his own argument by admitting that, if the plaintiff expected no compensation at the time of rendering the service, when the public interest would have been just as great as if he had expected compensation, the plaintiff should not succeed. His position, therefore, resolves itself into a mere statement that it is unjust that the defendant should not pay the plaintiff, and he has no valid argument to meet the counter proposition. It is worthy of remark that in this particular instance he admits that the weight of authority is against him.²

The absence of definition renders it impossible to construct such a notion of his theory as will render criticism of it either profitable in itself or free from the charge of not accurately representing him. The utmost that can be done is to consider some of his specific instances. The first to be considered will be a case in which, agreeing with the learned author that there is injustice, I should find it in a breach of obligation. A second will be a case in which I can find no injustice, because there is no breach of obligation, although the learned author holds otherwise. These two will suffice to define the difference of view.

1. In *Exall v. Partridge*,³ the facts were these. It was at that time the law of England that a landlord to whom rent was in arrear might enter upon the premises, and seize by judicial process and in satisfaction of the rent due whatever property might be found there, whether it belonged to the tenant or to somebody else. The defendants, of whom there were three, had all been originally tenants of one Welch, but two of them had assigned their interest to the defendant Partridge, without however procuring from their landlord Welch any release of their liability to him. They were thus under a legal obligation to the landlord to pay the rent; but as between themselves and Partridge they had no interest in the

¹ Page 354 *et seq.*

² Page 354.

³ 8 T. R. 308.

premises, and Partridge was solely liable. The defendant Partridge was a coach-maker, and the plaintiff, knowing all the facts, left his carriage under Partridge's care. The rent being in arrears, the landlord, as he was legally entitled to do, seized the plaintiff's carriage and was about to sell it. Thereupon the plaintiff, in order to release his carriage from the seizure, paid a sum equal to the rent, and brought suit to recover the amount so paid, not from Partridge only, but from all the defendants. It was objected that only Partridge was liable.

The court sustained a recovery against all three, and the learned author, by reason of his doctrine of unjust enrichment, agrees with them. I should agree with the conclusion as to Partridge, but on grounds neither of enrichment nor of restitution, and I should disagree as to the other two.

The defendant Partridge was a bailee of the carriage, and therefore under a contractual obligation to care for it. His omission to protect it from seizure was a breach of that obligation, precisely analogous to a breach by failure to protect it from storm which to his knowledge was imminent. Indeed, in the actual case, his omission was the more culpable, since his own wrong-doing had brought about the danger. It is as if he had wrongfully diverted a watercourse from some neighbor's land, and had then omitted to protect the carriage from the effects of the water so diverted. The damage which the plaintiff suffered from the breach was precisely the amount of rent which he had to pay in order to save his property. Therefore the plaintiff should be allowed a recovery from Partridge upon his contract of bailment to the extent of his payment. The doctrine of restitution cannot apply, because, while the plaintiff suffered a loss and Partridge received a benefit, nothing passed from him to Partridge and there was nothing for Partridge to restore, and the plaintiff's recovery is only by way of damages. The doctrine of unjust enrichment is unnecessary, because there is already a remedy through well recognized principles of contract.

The discussion so far indicates a reason for agreeing with the learned author in his conclusion that the defendant Partridge is liable, but for disagreeing with his *ratio decidendi*. A discussion of the relations of the other defendants will perhaps make clearer the difference of view, although it should properly accompany the consideration of the next case.

The plaintiff's carriage was on the premises without the request of the defendants other than Partridge. They therefore owed him no duty of a consensual nature, and they committed no tort against him. Consequently the doctrine of restitution has no application to them. I can discover no obligation of any character which they owed to the plaintiff, and which they failed to perform, and therefore I can see no reason for a recovery on any theory. The learned author, however, would sustain the recovery upon the principle that the plaintiff had paid the money under compulsion, and was not therefore what he calls an "officious volunteer."¹ He does not define the meaning of officious, but apparently he regards it as a valid principle of law that, when the plaintiff has rendered the defendant a service, and in rendering it was not officious, the plaintiff can recover its value.² His cases which he decides according to the principle of officiousness hardly help to an understanding. For example, according to him, a plaintiff who saves the defendant's property from destruction without expectation of compensation is officious, and cannot recover, while if he had expected compensation he would not be officious and could recover.³ I submit that such a distinction in no wise accords with the common notion of officiousness. Apart from any such verbal criticism, however, without an explanation the word lends no assistance to the decision of the question. To prove that one who *is* officious *cannot* recover is by no means to prove that one who is *not* officious *can* recover. So to argue is to commit the fallacy of undistributed middle. It was therefore, at the very least, incumbent upon the author to establish that, by precedent at any rate, the doctrine of unofficious volunteers is an admitted principle of our jurisprudence. This he has failed even to attempt, and it is at least questionable if such be the fact. Finally, the learned author has hardly shown the plaintiff to be unofficious. The plaintiff put his carriage upon the premises knowing its liability to seizure, and, so far as these defendants were concerned, without request. He was quite as officious therefore in assuming that risk voluntarily as he would have been in voluntarily paying the rent itself without request and without the seizure. Having officiously put himself in a position of danger, he cannot afterward say that he was unofficious in paying the penalty. I submit, therefore, that the learned author has given no sufficient argument in support of his proposi-

¹ Page 391.² Page 350.³ Page 354.

tion that the plaintiff in *Exall v. Partridge* has a cause of action against any of the defendants except Partridge.

There is a ground in the particular case for sustaining the plaintiff's recovery, which is not adverted to either by the court or by the author. At the time of paying the rent, the plaintiff took a receipt stating that the payment was made "on account" of the defendants, and this receipt may be regarded as an informal assignment of the landlord's rights to the plaintiff, which the plaintiff might enforce in a proper form of action. Where this element is lacking, however, it is difficult to see any breach of right, or consequently any cause of action.

2. In *Deering v. The Earl of Winchelsea*,¹ it appeared that the plaintiff and defendant were sureties on separate bonds for the faithful performance of his duties by a brother of the plaintiff. The brother having defaulted in his duties, and the plaintiff having been compelled as surety to pay the whole loss, the plaintiff endeavored to compel the other two sureties to contribute to the burden in equal shares. There was no evidence of any contract to contribute. The court held that the plaintiff should recover, and the learned author agrees with the court, regarding the case as a good illustration of the doctrine of unjust enrichment.²

The doctrine of restitution does not apply, because the defendant has committed no breach of a consensual obligation and no tort, and also because there is nothing for him to restore, for he has received nothing from the plaintiff.

The learned author himself advances no argument in support of the plaintiff's right of recovery; but he cites from the opinion of the court a passage of which the essence is contained in these sentences: "The point remains to be proved that contribution is founded upon contract. If a view is taken of the cases it will appear that the bottom of contribution is a fixed principle of justice, and is not founded in contract. . . . The reason is, they the sureties are all *in æquali jure*, and, as the law requires equality, they shall equally share the burden."

With all due deference to the learned court and to the author, the point to be proved is, not that the right to contribution is founded on contract, but that it exists independently of contract. It was the latter proposition that the plaintiff affirmed and the defendants denied. But, apart from this, is the reasoning of the

¹ 2 B. & P. 270.

² Page 401.

learned court as to equality correct? I submit that it is not. In the first place, by hypothesis the plaintiff voluntarily assumed the risk of bearing the whole burden upon his own shoulders. If he were compelled to bear it, as in this case he was, he has suffered no injustice, though it might be a hardship. In the second place, the creditor to whom the various bonds were delivered had the right to choose, among all who were bound to him thereby, which one he would sue. The bonds being separately executed and the parties being different, separate suits would be necessary to enforce them, and many reasons, such as difficulty in serving the defendants or possible defences to some of the suits, might render one suit much more advantageous to him than another. The creditor, therefore, is quite within his rights in holding one surety rather than another responsible for his loss. In the third place, the defendants have committed no breach of obligation against the plaintiff, unless their duty to contribute is an obligation. Since that obligation is the matter at issue, it cannot be assumed without proof. The equality then is that all the sureties are liable to be called upon for the whole loss, and that their risk, or chance of bearing the loss, is equal. It is not that they should all bear equal shares of the same burden. The result of holding otherwise is that a surety who voluntarily assumes a liability is enabled to throw a part of it upon persons whom he never asked to share it, who have in no wise broken any obligation to him, and whose relation to him is, so far as he is concerned, purely accidental. For these reasons it seems to me clear that contribution should never be allowed except as it is based upon some consensual right.

It must be admitted that both in this case and in the case of *Exall v. Partridge*¹ it would be a generous act on the part of the defendants to pay the plaintiff what he asks, and thence it may be argued that the courts in enforcing the liability have merely recognized, consciously or unconsciously, the fact that generosity may be enforced by them in such cases as a legal duty. In that event, the duty would be classified under what I have called the duty of co-operation. This is certainly a very arguable proposition; but certain consequences of it must be considered. Generosity involves an act of self-sacrifice. Suppose that by enforcing the performance of such an act the defendant were impoverished. Would it be just for the court to enforce it? Not every act of

¹ 8 T. R. 308.

generosity can be made legally obligatory. No court, for example, could justly take upon itself the task of saying that in such and such cases it would compel the giving of alms. If in some instances, then, it enforced the duty of generosity, and in some it refused, it will become necessary to establish some criterion whereby to distinguish those in which it could act from those in which it could not. The courts have never consciously undertaken such a task, and would undoubtedly deny their essential power to attempt it.¹

Assuming, however, that some such principle were established, the remedy of the plaintiff is by way of damages for a breach of obligation, and not by way of restitution. Neither would it avail the doctrine of unjust enrichment. The measure of recovery is the plaintiff's loss, and it is only accidental, and perhaps not true in all cases, that the plaintiff's loss equals the defendant's enrichment. Even if it were always true, however, the result would be that the doctrine of unjust enrichment would include divergent forms of remedy ascertained by several and independent modes of analysis. It would therefore violate the canons of scientific classification. Moreover, it is an unnecessary link in the chain of reasoning, because, before the injustice is established, the rights of the parties are already determined. The doctrine is therefore mere surplusage.

It is of course impossible to meet in anticipation all the arguments that may be advanced in opposition to the principle of restitution ; but there is one query which will at once occur even to those readers who possess only the rudiments of legal learning, and which bears a special relevancy to the question of justice. Where with reference to this principle are to be classified the remedies granted upon mistake? The question is so important that it should receive a commensurate attention.

The learned author assumes without argument that mistake, when the defendant has profited and the plaintiff has lost thereby, is a ground of recovery upon the doctrine of enrichment, and he has contented himself with merely distinguishing a payment under mistake from a voluntary payment with knowledge of the facts,

¹ See *ante*, p. 495. Of course, if the duty of contribution were expressly grounded upon any such theory, we should be forced to admit that the duty of co-operation is sometimes enforced by the court of its own mere motion. Until the court takes that express position, however, it is preferable to regard these decisions as based upon a misapprehension.

which, when made without a consideration, is a gift.¹ The proposition, however, that a mistake constitutes a ground of recovery is not true as a universal proposition, and, like all other such propositions, can be defeated by showing a particular instance in which it fails. The learned writer himself indicates many such instances.² Moreover, it is by no means an obvious proposition in any case that a mere mistake of the parties should create a cause of action in favor of one against the other. If mistake involves no breach of right, as is commonly said, how can a plaintiff ask the court to grant him relief against one who has omitted no duty? The learned author himself says, "There being no contract between the parties, unless the defendant is guilty of some wrong, the plaintiff can establish no cause of action against him."³ He is speaking, to be sure, of the necessity of proving a tort as the basis of action in the case of restitution upon a tort, but he calls this an "almost self-evident proposition," and indeed it is. It certainly should suffice to throw upon him the burden of showing the wrong involved in mistake.

The true theory, as I conceive it, may be best illustrated in the consideration of three cases.

I. Suppose that A, with knowledge of the facts, makes an intentionally false statement of them to B, in order to induce B to pay him a sum of money.

This is a clear case of deceit, and B should be allowed to recover back the money.

II. Suppose A makes the same statement, which is false in fact, but which he honestly supposes to be true, in order to induce B to pay him the money. Before the payment, however, he learns the falsity, but, suppressing his knowledge, allows B to pay him on the faith of the representation.

This is clearly as much deceit as the former case, and B should be allowed to recover back his money.⁴

III. Suppose the same facts, except that A discovers the falsity of his statement after the payment instead of before it.

This is a case of mistake, but it is indistinguishable in principle from the others. A is as morally, and should be as legally, delinquent in retaining the money as in the other cases he was morally and legally delinquent in taking it. An action to recover back the money paid in the case of such a mistake bears much the same

¹ Pages 26, 27.

³ Page 160.

² Pages 32, 34, 43, 59, 71, 72, 77, and elsewhere.

⁴ Pollock on Torts, 4th Eng. ed., 265, 267.

relation to an action to recover money paid upon deceit that an action for a conversion of property by a wrongful detention bears to a similar action upon an originally wrongful taking. Mistake is thus relegated, if the analysis is correct, to the same category as deceit, and the further question is as to the nature of deceit.

Deceit is always, so far as I am aware, classed as a tort ; but it will be observed that the duty is positive, not negative. It is to tell the truth. This quality at once differentiates it from all torts. It also differs from torts proper, in that it is not an interference with any person's free activity. By hypothesis, the false statement is addressed to the individual's free volition, influencing it rather than compelling it. If there were compulsion, deceit would reduce itself to duress. Moreover, there is in all cases of deceit a meeting of minds on the point that the defendant is telling the truth. That is the understanding of the plaintiff, and that is the understanding which the defendant wishes the plaintiff to have. Then, too, the plaintiff has either of two remedies : he may rescind the transaction, restoring to the defendant what he has received and taking back what the defendant has received, which is restitution, or he may have damages, which is reparation in value. That is, the plaintiff has a right of precisely the same elements and with precisely the same remedies as those inherent in a formal consensual obligation to tell the truth.

Nor is it difficult to work out such an obligation in fact. Communication is impossible except upon a basis of truth. It is impossible to conceive a being with an intelligence sufficient to make a statement who cannot also understand whether the statement conforms to his own beliefs and realize that the one with whom he is communicating relies upon its truth. In the very nature of communication a mutual understanding between the parties is involved. It is quite as easy, therefore, to find such a mutual understanding in fact, even though it be not expressed in words, as to find a real contract when a householder orders supplies from his grocer and yet does not in words promise to pay for them. In both cases there is a common ground of negotiation, and this common ground, by the consent of the parties, defines their relations with each other.

In every communication, therefore, there is a real understanding that he who makes the representation is telling the truth, and the act of entering upon such a representation, which is a purely vol-

untary act, involves a real undertaking to tell the truth. This undertaking may or may not contain all the elements of a contract as they are defined by our law, but nevertheless it imports a legal obligation. An intentional breach of it is deceit; an unintentional breach is mistake.

If the foregoing views of deceit and mistake are sound, it follows that the remedy by way of restitution depends upon the possibility of rescission, that is, of undoing the obligation. Now the representation in the case of mistake is mutual, because the mistake is mutual. If, therefore, the defendant alters his position in reliance upon its truth, rescission cannot be had without his consent and the remedy of restitution cannot be applied. This seems to be the true ground for the doctrine of purchase for value as applied by the learned author in his chapter on "Recovery of Money paid upon Mistake."¹ With this explanation, and with such emendations as would be naturally consequent upon it, the principle of restitution is in accord with the conclusions of that chapter.

The cases which have just been discussed have sufficiently indicated the divergence between the conception of justice entertained by the learned author and the conception involved in the principle of restitution. It remains only to show the difference between the identity required by the principle of restitution to exist between the plaintiff's loss and the defendant's gain, and the enrichment required by the doctrine of unjust enrichment. This difference has incidentally been noted in the discussion of the cases of *Exall v. Partridge*,² and *Deering v. Winchelsea*.³ In the former, the plaintiff lost the amount which he paid the landlord, and the defendants profited by their rent, which was paid. The doctrine of enrichment could apply therefore, but the principle of restitution could not, because, since the defendants received nothing from the plaintiff, there was nothing for them to restore. Whatever remedy the plaintiff had was by way of damages, and not by way of restitution. In the latter case there is, for the same reason, no restitution possible. It is somewhat difficult, moreover, to ascertain the measure of enrichment. When one surety pays the whole debt, he loses the full amount. The other surety also profits by the same amount, because he is saved from paying the full amount, and the first inference is that the amount of the debt is the amount

¹ Pages 26-158.

² 8 T. R. 308; Keener on Quasi-Contracts, 388.

³ 2 B. & P. 270; Keener on Quasi-Contracts, 401.

of the enrichment. This, however, is absurd, because one surety could then recover the whole debt from another, who could thereupon turn about and on the same principle recover it back. The learned author does not meet this difficulty ; but he assumes without argument that the plaintiff can recover only a proportionate share. That measure of recovery can be ascertained, however, only upon the theory that there is already in existence a duty to contribute *pro rata*, and that the enrichment of the defendant is the advantage which he retains upon a refusal. If that duty is made to depend upon the theory of unjust enrichment, there is a complete circle of reasoning, as thus : the defendant is unjustly enriched by his proportionate share of the debt, because he ought to pay it and does not ; but he ought to pay it, because if he does not he is unjustly enriched. It follows that, if the plaintiff is to recover at all, it must be upon some other principle than that of unjust enrichment.

One more case will suffice. In *Phillips v. Homfray*,¹ the facts, shorn of some complexity, were these. The plaintiff was the owner of an underground road through a mine, which road, so far as he knew, was unused. It appeared, however, that the defendant had used it for a considerable period of time, and at a considerable saving of expense. When the plaintiff discovered the truth, he brought suit to recover an amount equal to the defendant's savings. There was no evidence that the road suffered any injury by the defendant's unauthorized use. The court denied the recovery ; but the learned author regards the case as an illustration of the doctrine of unjust enrichment, and would permit a recovery. The court said in italicized words that the defendant "saved his estate expense, but he did not bring into it any additional property or value belonging to another," or, in other words, denied that the plaintiff suffered any expense. The learned author meets this argument by pointing out, what is perfectly true, that the defendant was enriched by the amount of his savings ; but he fails to point out that the plaintiff was at any expense, and that is the very difficulty of the case that the court felt. The point is unanswerable. The plaintiff was not deprived of the use of the property himself, because he made no attempt to use it. He supposed all along that it was unused, and there was nothing to show that, if he had tried to use it, the defendant would have prevented him. He was not deprived of any rentals which a third party might

¹ 24 Ch. Div. 439.

have paid him for the use of it, since he made no effort to rent it. There is only one other supposition possible, to wit, that the plaintiff was deprived of rents which the defendant ought to have paid him. Such a duty on the part of the defendant cannot be explained by the principle of unjust enrichment without a vicious circle, as thus: the defendant is unjustly enriched by the amount of rents which he ought to pay and does not; but he ought to pay those rents, because, if he does not, he is unjustly enriched.

In *Phillips v. Homfray* a recovery was denied; but there are cases where the defendant, by a wrongful use of the plaintiff's property, has benefited himself without causing any loss to the plaintiff, and is nevertheless held in the cases to a liability for all the profits which he has made.¹ To allow a recovery in these circumstances is difficult to justify. It certainly cannot come within any notion of remedy as remedy, because, *ex hypothesi*, the plaintiff has suffered no damage, and there is no damage to repair. Neither is there anything for the defendant to restore. For this reason also the plaintiff cannot bring himself within the principle of enrichment. A recovery therefore, if allowed, reduces itself to a mere punishment, on the theory that no one shall take an advantage by his own wrong. It is a measure of punitive, not remedial, justice, and can be upheld only on the principle that underlies the treble or punitive damages sometimes awarded on a breach of contract. Whether punishment for a wrong should ever take the form of permitting a recovery by a private individual in excess of his own loss is certainly, as a matter of justice, a very debatable question.

There might be many more discussions of the author's cases; but I have given enough to indicate both my agreements and my differences with his doctrine. The whole matter may be summed up in a few words. When the plaintiff can establish that his loss is the defendant's gain, and that the defendant is guilty of a breach of a consensual obligation, or of a tort, he can by action compel restitution in value. So far as this principle agrees with the learned author's results, those results seem to me to be sound; but that beyond these limits there is any principle of unjust enrichment seems to me to be at least questionable.

Everett V. Abbot.

NEW YORK, 1897.

¹ See cases cited and discussed by the learned author at pages 165 *et seq.* of his treatise.

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THE HARVARD LAW REVIEW, with the appearance of this number, completes the first ten years of its existence. An Index of all the articles that have been published in the ten volumes has been prepared, and is printed with this number as a supplement to the regular Index of Volume X.

DOUBLE COMPENSATION. — In the Canada Law Journal, Vol. XXXIII. p. 151, attention is called to a novel case lately argued before the Supreme Court of Nova Scotia. A, the plaintiff, the owner of a tug, made a contract with B, the defendant, for a boiler for the tug, to be delivered at a certain time, it being understood by both that the tug would be useless without the boiler. Under similar circumstances, A made a similar contract with C for an engine. Both B and C broke their contracts; A now sues B, and seeks to recover compensation for loss of use of the tug. B claims that, had his contract been performed, A would have had a tug without an engine, and would therefore still have lost the use of the tug; and hence cannot recover from B damages for loss of use.

This ingenious contention is evidently unsound. The loss of use having been within the contemplation of the parties, the value of it may be recovered provided it resulted proximately from the breach of contract. In this case B's breach and C's took effect concurrently in causing the loss of use, and both are therefore legally responsible. It is evidently no sufficient answer to say that either cause alone might have caused the loss, since both in fact caused it.

Suppose A recovered from B full damages, could he simultaneously or subsequently recover the same amount from C, thus getting double compensation? At law, it seems so. B and C were not joint wrongdoers, but liable each to make compensation for the non-fulfilment of his proper contract duty. The value of the two contracts was the same, the compensation due upon breach the same; and it was necessarily the full

amount required for compensation, — since it would not seem possible in this case to divide the consequential loss. The plaintiff, having the legal right to recover the value of the contract, gets it, though it may do more than make him individually whole; as where a party sues on a contract made wholly or partly for the benefit of a third person. There seems to be no case just like the one under discussion. A somewhat analogous case is that where damages for a tort are not reduced by the previous payment to the plaintiff on a policy of insurance. *Perrott v. Shearer*, 17 Mich. 48; 1 Sedg. Dam., 8th ed., § 67. See also *Elmer v. Fessenden*, 154 Mass. 427.

So the question stands at strict law. Whether equity might modify the rights of the parties, and how far such modification might be made available as an equitable defence by either B or C in the action at law, are matters upon which the actual decisions throw no light. See *Gooding v. Shea*, 103 Mass. 360; *Jackson v. Turrell*, 39 N. J. L. 329.

"PUBLIC DEFENDERS." — Mrs. Clara Foltz of the New York Bar is firmly convinced that there is at least one serious defect in our judicial system. While the criminal court is admirably equipped with machinery for the prosecution of offences, it is lamentably deficient, she believes, in the machinery for defence. The unfortunate prisoner who is unable to pay for counsel must expect to be prosecuted by the ablest of attorneys, backed up by all the resources of the State, and only too frequently to be defended, if at all, by a court appointee who is wholly inferior to the men with whom he must cope. The remedy for this, Mrs. Foltz finds in the creation of a new officer, to be called the Public Defender. She has formulated her ideas in a bill which is to be laid before the legislature of New York. It provides for the election to the office of an attorney at law in each county, whose duty it shall be "to attend all criminal courts, and to appear for and defend all persons charged with violation of the law who are without counsel and who desire an attorney to appear for them."

While an impecunious prisoner whose case is tried in one of the smaller towns, where it will become matter of common talk among lawyers, is not likely to suffer for want of competent counsel to defend him, it is apt to be different amid the hurry and bustle of litigation in the large cities, where such things pass by unnoticed. Even there it may perhaps be doubted if substantial injustice is often done a prisoner under the present system. If he is not adequately represented by counsel, the average judge is likely to guard his interests well enough, if not to err on the side of leniency. It is an unpleasant position for the judge, however, and of course involves a departure from the strictly judicial function. Mrs. Foltz's idea certainly merits consideration.

THE SUPREME COURT AND THE PRESUMPTION OF INNOCENCE. — In *Coffin v. United States*, 156 U. S. 432, it will be remembered that the Supreme Court held it was error for the judge, in a criminal case, to refuse to charge as to the presumption of innocence, notwithstanding that the jury were explicitly told that they must be satisfied of the prisoner's guilt beyond a reasonable doubt. As a purely theoretical question, the decision seems wrong. It may perhaps be supported, however, as was pointed out in 9 HARVARD LAW REVIEW, 144, on the practical ground

that the open refusal so to charge might have misled the jury. But the famous *dicta* in the opinion of the court, to the effect that the presumption is evidence in favor of the accused, seem clearly indefensible. The late case of *Agnew v. United States*, 17 Sup. Ct. Rep. 235, throws some light on the position the Supreme Court really takes on the question. In that case it was assigned as error that the judge charged as follows : "The defendant is presumed to be innocent of all the charges against him until he is proven guilty by the evidence submitted to you. This presumption remains with the defendant until such time, in the progress of the case, that you are satisfied of the guilt beyond a reasonable doubt." Also that he refused to give the following instruction : "Every man is presumed to be innocent until he is proved guilty, and this legal presumption of innocence is to be regarded by the jury in this case as matter of evidence, to the benefit of which the party is entitled. This presumption is to be treated by you as evidence, giving rise to resulting proof, to the full extent of its legal efficacy." The court held that the instruction given was quite correct, and substantially covered that requested ; that *Coffin v. United States* was in no way disregarded, as the presumption of innocence was clearly stated. It is the doctrine of the Supreme Court, then, that to tell the jury that the presumption remains with the defendant until his guilt is proved beyond a reasonable doubt, is equivalent to telling them that it is evidence to the benefit of which he is entitled. Does not this look as if the position really taken by the court is that the presumption is a substitute for evidence, and not evidence itself ? If the presumption of innocence is a true presumption, this is undoubtedly sound doctrine.

A CASE UNDER THE THIRTEENTH AMENDMENT. — It is interesting to find the Supreme Court dealing with the application of the Thirteenth Amendment to circumstances entirely unconnected with the race question. That a principle of general application was added to our constitutional law by the amendment is not to be doubted (Story on the Constitution, 5th ed., § 1924), but the question is as to its scope. This came before the court in *Robertson v. Baldwin*, 17 Sup. Ct. Rep. 326. The Revised Statutes provide that deserting seamen may be taken before a justice of the peace and by him committed to jail, to be delivered to the master on the sailing of the vessel, or sooner on demand. The court bases its decision that these sections of the Revised Statutes are constitutional on two grounds. One is that this sort of thing has always been found necessary. Provisions of a like character, and often very harsh, are to be found in the law of every maritime nation, beginning with that of the Rhodians. This kind of argument, showing that the framers of the Amendment could not have aimed at the practices complained of, is the regular and satisfactory way of dealing with these questions of interpretation. Nor will the soundness of the result be doubted. It is absolutely certain that those engaged in securing the benefits obtained from the Civil War did not mean to prevent the customary methods of enforcing obligations recognized by civilized nations foremost in the crusade against slavery. The system of discipline on a ship does not resemble slavery. The master is all powerful aboard, but he is answerable in court for his acts when the voyage is over. One of the evils of slavery was its effect upon the dominant race. It is not perceived how the responsibility of the master of a vessel can have an evil influence upon him. Nor is it at all clear how discipline can

injure the subordinates when the fact is well known that nothing is so demoralizing as the lack of it. Now, to accomplish all this, it has been found necessary to compel both sides to live up to their engagements, and this is the object of the Revised Statutes.

The court, however, lays down as a general test that any form of "servitude, which was knowingly and willingly entered into," is not an "involuntary servitude" within the meaning of the Amendment. Such contracts of service may be void on grounds of public policy, or there may be no means of enforcing them. Assent to this proposition may not be readily given. In the *Slaughter House Cases*, 16 Wall. 36, 89, Mr. Justice Miller expressed the opinion that the words "involuntary servitude" were inserted lest it might be possible to defeat the real scope of the Amendment by the contention that slavery had come to mean African slavery as it had existed in this country. He cites, as examples of the abuses aimed at, the long terms of apprenticeship common in the West Indies, and the condition of serfdom. As the Amendment provides that slavery shall not exist in this country, surely a man cannot sell himself into slavery. Were not the forms of servitude the Amendment was intended to cover meant to be dealt with in exactly the same manner as slavery? The words "slavery" and "involuntary servitude" are coupled together. Is it not fair to say that it was the status of "involuntary servitude," no matter when it became involuntary, that was deemed pernicious, and not merely the method of its creation? There seems to be much to be said for the view taken by Mr. Justice Harlan in his dissenting opinion, that the word "involuntary" is not to be separated from the word "servitude," and its force confined to the inception of the service.

NEGOTIABILITY OF A NOTE PAYABLE TO A TRUSTEE.—It is said in the case of *The Third National Bank v. Lange*, 51 Md. 138, that a note payable on its face to the order of A B, trustee, is not "within the class of paper known as commercial paper." If this expression means no more than that a purchaser of such paper must always take it with notice that the payee held it in trust, so that the purchaser will take the risk of getting no beneficial interest in the note in case the trustee has transferred wrongfully, and that therefore such paper will not pass so freely from hand to hand as ordinary bills and notes, the language of the court is entirely correct. If the assertion, on the other hand, is that such paper is not negotiable, or that it is subject to the equities existing between the original parties in the hands of all subsequent holders, the court was clearly in error. This appears from the recent well considered case of *Fox v. Citizens' Bank & Trust Co.*, 37 S. W. Rep. 1102 (Tenn.). In that case a trustee sold to the plaintiff certain lots of land, with the consent of the beneficial owners, and took the plaintiff's notes payable to him as trustee, which he discounted at the defendant bank. It turned out afterwards that the trustee was unable to convey the land sold, so that the consideration for the notes wholly failed; but of this defendant had no notice. The plaintiff then sought for an injunction to restrain defendant from suing on the notes, but this the court properly refused to grant. Whatever might be the bank's liability to the *cestui que trust* of the payee in case he had committed a breach of trust in transferring to the bank, the payee has clearly power to pass the legal title in the note, and the bank is entitled to hold it as free from any equities between previous

parties as any other purchaser for value without notice. The word "trustee" apparently can give no notice of any equity in favor of the maker; nor is there any authority for such a notion. The way in which the courts treat such notes is shown in *Downer v. Read*, 19 Mich. 493, where the word "trustee" is said to be merely descriptive. Though this descriptive epithet cannot be said to be superfluous, for it does create a possible liability to persons claiming under the trustee, yet in a dispute between the parties to the note the epithet is immaterial. A trustee holding a note appears, in brief, to be in a position like that of an indorsee for collection, who is certainly entitled to pass on the note, subject always to the trust expressed by the indorser for collection. This view is not inconsistent with the decision in *Bank v. Lange*, *supra*, nor with *Nicholson v. Chapman*, 1 La. Ann. 222, and cases following it. The courts will in such cases give relief to the payee's *cestuis*, but not to the maker.

INJUNCTIONS AGAINST LIBELS. — It has been generally considered that the jurisdiction of equity over torts only extended to violations of property rights. Thus it was said by Lord Hardwicke, in *Huggonson's Case*, 2 Atk. 469, that equity would not enjoin a libel, unless it were also a contempt of court; and in 1873 a similar declaration was emphatically made in the case of *Prudential Assurance Co. v. Knott*, L. R. 10 Ch. 142. Five years later, however, it was stated in the cases of *Beddow v. Beddow*, 9 Ch. D. 92, and *Quartz Hill Mining Co. v. Beall*, 20 Ch. D. 501, that a libel might be in certain extreme cases restrained by injunction; this opinion was confirmed by the Court of Appeal in *Bonnard v. Perryman*, [1891] 2 Ch. 269; and such an injunction has actually been granted in a few cases, notably in *Monson v. Tussauds*, [1894] 1 Q. B. 671. This innovation on the practice of the Court of Chancery seems to have been considered in the opinions in the four cases just mentioned, as authorized by the Common Law Procedure Act of 1854, and the Judicature Act of 1873. Whether these Acts, which were apparently intended to regulate only matters of form, ought to be construed as conferring on any court powers which no court had ever possessed before, seems to be extremely doubtful. The propriety of such an interpretation of these Acts, and of the assertion on any ground of a power to enjoin libels, is vigorously denied in the February number of the *Law Magazine and Review*, in an article written by Mr. H. C. Folkard. These late cases nevertheless continue to represent the law in England; and the doubt whether they can properly be rested on statutory grounds, while from one point of view it simply suggests that these cases were erroneously decided, from another point of view seems to show that the jurisdiction of equity has actually been extended in an essential point without statutory aid.

The American courts have adhered strictly to the early practice of the Court of Chancery, except perhaps in the case of *Emack v. Kane*, 34 Fed. Rep. 46; and the late English cases have had no effect in this country, being treated as grounded on statutes. (See *Kidd v. Horry*, 28 Fed. Rep. 773.) Neither in the early English cases, however, nor in the American cases, which merely follow them, are any very satisfactory reasons given why a violation of a personal right, such as the right to one's reputation, ought never to be restrained by injunction, except that the courts have never in fact issued such injunctions. Such a remedy will very seldom be

required, as violations of personal rights are seldom acts of such a continuing nature as are properly the subjects of an injunction. Supposing, however, that such a continuing tortious act, likely to inflict irreparable injury, does clearly appear as it did in the case of *Monson v. Tussauds*, *supra*, it would seem desirable, at first sight, that an injunction should be issued, if it possibly can be. The impossibility, unlawfulness, or even impropriety of the courts thus spontaneously extending their equitable jurisdiction, would not seem to be beyond dispute. The fact that a libel is a crime, as well as a tort to an individual, would not apparently prevent equity from interfering to prevent it. Nor would the necessity of trying the question of the existence of the libel by a jury appear to prevent equity from furnishing relief of the peculiar nature that equity alone can give, when the particular circumstances might require it. There is no reason, however, to suppose that American courts of equity will soon, or indeed ever, unless by the aid of statutes, make such an innovation as to interfere for the protection of any but property rights.

CONTRADICTION OF DYING DECLARATIONS. — The recognized exceptions to the rule against hearsay rest on precedent rather than reason. According as judges are influenced chiefly by intimate knowledge of the history of the law of evidence, or by the desire to apply its principles on a basis of rationality which the authorities themselves do not warrant, these exceptions contract or expand in their application in various jurisdictions. But the tendency to restrict the scope of the exception known as "Dying Declarations" has been practically universal. Apparently the original reason for admitting this species of evidence lay in the belief that the solemn occasion of death furnished a guaranty of truth equal to an oath in court. To-day the exception is strictly limited to cases of the deceased's statements concerning the homicide which forms the subject of the charge, and the declarant must have realized himself beyond hope of life. Whether the modern strict application is due to the fact that the position of one *in articulo mortis* is no longer regarded with the same awe as formerly perhaps deserves consideration. Certain it is that the reason usually assigned for this exception at present is rather the necessity which requires this evidence to convict murderers against whom, from the nature of the crime, other testimony is often lacking, than any intrinsic value in what is said in anticipation of death.

In light of the foregoing considerations, the decision of the Supreme Court in *Carver v. United States*, 17 Sup. Ct. Rep. 228, is eminently satisfactory. It was there held that statements, themselves not admissible under any of the exceptions to the hearsay rule, might come in to impeach a dying declaration already admitted. The only possible exception that could be taken to this decision is, that it ignores the generally adopted rule that, in order to impeach the testimony of a witness by proof of previous contradictory statements, the witness must first be asked whether he made such statements. It is submitted that this objection is not a valid one. The rule ignored is one of practice rather than of evidence, and on principle should not be extended to the case of dying declarations. The necessity which requires the admission of the hearsay would seem to involve the abrogation of the rule that the witness be given a chance to explain or deny. In other words, if one exception be made, it is only fair to make a second. The argument to the contrary

amounts to this : because the party against whom the declaration operates by its admission has lost his right of cross-examination, he must also lose his right of impeaching the evidence ; a rule pertaining to cross-examination is to be applied when cross-examination is impossible. The reasoning is fallacious, and is not sustained by the authorities. *State v. Lodge*, 33 Atl. Rep. 312 (Del.) ; *Battle v. State*, 74 Ga. 101 ; *People v. Lawrence*, 21 Cal. 368. The position taken in 9 HARVARD LAW REVIEW, 472, seems, on the whole, untenable.

MUST AN INNKEEPER ENTERTAIN ONE WHO IS NOT A TRAVELLER? — Apparently by the common law an innkeeper is compelled to receive and entertain as guests only those who are entitled to be called travellers. See Wandell on the Law of Inns, pp. 46-48, 55-58. Thus, in a leading English case, *Rex v. Luellin*, 12 Mod. 445, decided nearly two hundred years ago, an indictment for refusing to receive a person as a guest at an inn was quashed because there was no statement in it that the person desiring entertainment was a traveller. In a very recent English decision, *Lamond v. Richards*, reported and commented on in 32 Law Journal (Eng.), 56, 90, the plaintiff, who had stayed for several months at the defendant's hotel, went out for a short time, and on her return was refused admittance. It appeared that she had already received notice to leave, but she stated in court that it was her intention to remain at the hotel until it burned down. The court held that, the plaintiff having ceased to be a traveller, the defendant was therefore entitled, after giving reasonable notice, to eject her. The mere fact that she had been at the hotel for some length of time would not of itself disentitle her to the character of traveller. 2 Parsons on Contracts, 8th ed., 160. But there can be no doubt under all the circumstances of the case, that she had fully determined to make the hotel her permanent abode, and the court was amply justified, accordingly, in reaching the conclusion that she had no right to a traveller's privileges. The case under discussion involves, therefore, a decision of the very interesting question as to whether the innkeeper's obligation shall be so extended as to compel him to entertain for an indefinite period a person who, although he entered the hotel as a traveller, has now ceased to hold that character. Apparently there is no authority for such a proposition, and as the burdens resting upon innkeepers are already very severe, it seems hardly probable that the Court of Appeal, to which the case of *Lamond v. Richards* has been referred, will increase them in the direction indicated by the plaintiff's contention.

DOES AN ACTION LIE FOR PREVENTING THE ENFORCEMENT OF A DECREE? — A recent New York decision seems to show pretty plainly that one should not induce or aid a third party to commit a breach of legal duty to another, unless he wishes to answer the injured party in an action at law. The court decided in this case, *Hoefler v. Hoefler*, 42 N. Y. Supp. 1035, that an action similar to an action on the case at common law will lie by a wife, in whose favor alimony has been decreed pending divorce proceedings against one who has induced and aided the husband to leave the State in order to avoid the payment of the alimony. The same result was reached in the old case of *Smith v. Tomstall*, Carthew, 3, where

the plaintiff had obtained a valid judgment against a third party, and the defendant afterwards, to injure the plaintiff, induced the third party to confess a fraudulent judgment, in consequence of which the plaintiff was unable to secure the payment of his claim. *Michalson v. All*, 21 S. E. Rep. 323, a case recently decided in South Carolina, illustrates the same principle. Here the defendant, in collusion with the owner, placed farm products subject to an agricultural lien beyond the reach of the lienor, and it was held that the latter could recover. See also *Adams v. Paige*, 7 Pick. 542. *Lamb v. Stone*, 11 Pick. 527, seems inconsistent with these decisions. This case decided that, where the defendant had fraudulently purchased the property of a debtor and had induced him to leave the State to avoid paying his creditor, an action by the creditor would not lie. *Klous v. Hennessey*, 13 R. I. 332, similarly gives no relief to the creditor. These decisions, however, are placed upon the ground that, at the time of the defendant's acts, the debtor was as yet under no legal obligation to the creditor by reason of a judgment, lien, or similar proceeding, and that therefore the damage to the creditor was too remote and contingent to admit a recovery. While the justice of this position seems doubtful, and while the question as to whether the creditor would have secured a legal right against the debtor might well, it is conceived, have been left to the jury, these cases are clearly distinguishable from *Hoefler v. Hoefler* on the ground, as already indicated, that in the latter the third party was already under a legal duty to the plaintiff, and that the damage, the loss of the alimony, was therefore the direct and natural result of the defendant's acts. Whether or not the defendant in *Hoefler v. Hoefler* might have been held answerable in contempt proceedings, as suggested by the court, there seem to be reason and good sense, as well as authority, in favor of compelling the defendant in such a case to respond in damages to the injured party.

LEGISLATIVE POWER TO AMEND CORPORATE CHARTERS. — How far a legislature can alter a charter when it has reserved a power of amendment, one of the most confused questions of corporation law, has received the fullest consideration in a recently published opinion of the late Chief Justice Doe. *Dow v. The Northern R. R. Co.*, 36 Atl. Rep. 510 (N. H.). Portions of this opinion had previously appeared in Volumes VI. and VIII. of the HARVARD LAW REVIEW.

Judge Thompson in his work on Corporations says that two views may be taken as to the scope of this legislative power: first, that a right is reserved to change the charter in any way, provided, however, that such change is approved by the majority of the stockholders; second, that the legislature has a power to amend or repeal in the interest of the public. The principal case shows that the consent of the stockholders can make no difference. The majority is not able to bind the minority in accepting new changes, for no such authority was given them in the original charter. The question therefore must be as to the extent of the power retained by the legislature to amend the charter, although in opposition to the wishes of all the members of the corporation. It is the construction of an agreement. To what control did the incorporators submit in return for their charter privileges? Clearly it was not to be unlimited, so that the legislature could deprive them of property, or embark them in a new business. This would be absurd, even if, in accord with Judge Thompson's second view, it was for the interest of the public to have the property

taken or the business changed. Judge Doe, noting that the statutes providing for amendment were passed because of the decision in the *Dartmouth College Case*, approaches the other extreme, taking the view that they were intended merely to enable the legislature to repeal the charter. On a fair construction of the contract, it would seem as if it were intended to reserve an additional control over the corporation, and, while many of the cases support the first theory considered above by *dicta*, it is yet generally held that all alterations must be consistent with the scope and objects of the corporation's existence as originally chartered. It must be a change, not a substitution. Judge Thompson considers this a possible way of modifying his first view. In the principal case the corporation, a railroad, was given authority to lease its entire property. The court held, and it would seem correctly, that the change from an operator of a road to a mere lessor was a fundamental one, and therefore in excess of the power that had been reserved.

So much as to the correct construction of the agreement. Judge Doe goes on to say, that, even if the parties did suppose that the legislature stipulated for an unlimited right to amend, the result would be the same, for this would be an attempt to obtain a power greater than the Constitution allows. Judge Thompson also holds this view, and thereby his theories are substantially modified, but its soundness has been much disputed. See *The Sinking Fund Cases*, 99 U. S. 700. It should be added, that the opinion contains a long and masterly discussion of the *Dartmouth College Case*, in which the Chief Justice disagrees with the decisions of both State and Federal Courts.

REPRESENTATIVE ENGLISH JUDGES OF TO-DAY.—This brief sketch of four leading judges is intended to supplement the note on the Principal Courts of England, published in the last number of the REVIEW. Neither a biography nor a satisfactory diagnosis of character can be given within the limits of a note; but to vitalize and make individual certain familiar names is an object perhaps possible of attainment. The present Lord High Chancellor, Baron Halsbury, now at the head of the English judicial system for the third time, is a noteworthy exception to the common saying of the English bar, that a criminal practitioner never reaches the Woolsack. He was educated at Oxford, was made Queen's Counsel in 1865, Solicitor General under Mr. Disraeli in 1875, and sat as Conservative member for Launceston from 1877 till he was raised to the peerage and made Lord Chancellor in 1885. As Mr. Hardinge Giffard, he had a large criminal practice, and was particularly successful in addressing a jury. Eloquent and emotional, he often appeared so touched with his own appeals that he was given the nickname of the "Weeping Counsel." He appeared for the plaintiff in the famous Tichborne case, and held a brief in most of the important causes that came to trial when he was at the bar. Lord Halsbury is of genial and kindly temperament, a keen partisan, and very prominent socially. His career in the House of Commons was not brilliant, and he owes his high office rather to his legal abilities than to political eminence.

The most attractive figure on the English bench to-day is Lord Russell of Killowen, the Lord Chief Justice of England. For years he was the unquestioned leader of the English bar, and the list of causes in which he was leading counsel comprises nearly all the famous cases

of the time. Perhaps his greatest triumph was before the Parnell Commission, when his terrible cross-examination of Piggott, who was chief witness for the London Times, utterly broke down the strongest part of the case against his client, Charles Parnell. Russell's opening speech for the defence during this investigation lasted nearly seven days, and called forth the undisguised admiration of the presiding justices, the opposing counsel, and the public at large. He was counsel in the arbitration of the United States Fisheries claims at Paris, and defended Mrs. Maybrick when she was tried for the murder of her husband. Lord Russell is of Irish birth, was educated at Trinity College, Dublin, and has been Queen's Counsel, Liberal member of Parliament, Attorney General, and Lord of Appeal in Ordinary. He is said to be a charming companion, is a great lover of sport, and an accomplished horseman, and was formerly a member of the Jockey Club and well known on the turf.

The oldest English judge in active service is Lord Esher, M. R., formerly Brett, J. His career on the bench has been long and eminent, beginning with his appointment as Justice of the Common Pleas in 1868. His opinions are noteworthy for the firm and clear manner in which great principles of law are stated and applied to the facts in hand. Broad-minded, and with a high degree of legal acumen, he is regarded as the great apostle of judicial common sense. Kindly and with a keen sense of humor, he yet rules his court strictly on all points of decorum or delay, and among counsel has the reputation of being almost unduly severe. The robustness of his personality was made manifest when, entering politics as a Conservative, he boldly announced himself a Tory, and led a forlorn hope against Mr. Cobden at Rochdale in 1864. At Caius College, Cambridge, he was a distinguished athlete, winning a seat in the University boat. Lord Esher has been Queen's Counsel, member of Parliament, Solicitor General, and Judge of the High Court of Justice.

The Hon. Sir William Joseph Chitty, made Lord Justice of Appeal last January, comes from a family famous in legal annals, and himself is one of the ablest equity lawyers of the time. He is a judge profound and accurate in learning and of admirable common sense. His recent promotion from the Chancery Division met with practically universal approval. He was educated at Eton, and at Balliol College, Oxford, where he took a first class in classics. He took silk in 1874, and was Liberal member for Oxford in 1880. Chitty has always been keenly interested in athletics. He was on the eleven at Eton, and twice rowed stroke in the Exeter boat when he was a Fellow of that College. For years he was familiar to the general public as umpire of the Cambridge and Oxford boat races, and even now the dinners held annually after the Henley Regatta are said to be truly successful only when Chitty presides. In social and human qualities, as well as from the professional point of view, the new Lord Justice seems to be particularly well equipped.

RECENT CASES.

BILLS AND NOTES—CHECK—RIGHT OF HOLDER AGAINST DRAWEE.—A check, duly indorsed, was passed through several hands, and then deposited with the plaintiff bank, who gave the depositor credit therefor, and presented it to the defendant bank, the drawee, for certification. Defendant refused to certify the check, having been notified by the drawer to stop payment. *Held*, that plaintiff was entitled to judgment for the amount of the check, and that defendant could not set up as a defence that the several transfers of the check had been without consideration, there being no proof that plaintiff was aware of any infirmity in the check. *Nat. Bank of America v. Nat. Bank of Illinois*, 45 N. E. Rep. 968 (Ill.).

The decision is based upon the ground that the drawing of a check upon a fund deposited in a bank amounts to an assignment of such fund to the amount of the check, and gives the holder a direct cause of action against the drawee after demand made while the drawee has sufficient funds of the drawer on hand. This doctrine has also been adopted in Iowa. *Roberts v. Corbin*, 26 Iowa, 315. The better view is that taken in *Hopkinson v. Forster*, L. R. 19 Eq. 74, holding that the drawing of a check gives the holder thereof no right of action against the drawee, and that the drawer is the only one who can sue the drawee for failure to pay to his order.

BILLS AND NOTES—INSANE MAKER.—Where an insane person gave a note for legal services in securing an inquest of his condition, *held* that there can be no recovery on the note, though reasonable remuneration may be obtained for the services. *McKee's Adm'r v. Purnell*, 38 S. W. Rep. 705 (Ky.).

The better view would seem to be that there can be no recovery on the note of an insane person. 1 Daniel on Neg. Inst., 4th ed., § 210. But the decisions are by no means in accord. There is authority that those contracting in ignorance of the insanity may enforce the instrument. *Lancaster Bank v. Moore*, 78 Pa. St. 407. And there is another view that recovery may be had on the note if it were given for necessities, or it would seem for value. *McCormick v. Littler*, 85 Ill. 62. The proper way to do justice is to allow a claim, as in the principal case, for a reasonable sum, without reference to the note.

BILLS AND NOTES—NOTE PAYABLE TO TRUSTEE.—A trustee obtained notes for a consideration which wholly failed. He transferred the notes, by consent of his *cestuis*, to a purchaser for value, without notice of the failure of consideration. *Held*, that the fact that the notes were made payable on their face to him as trustee did not destroy the negotiability, nor subject the purchaser to the maker's equitable claim against the payee. *Fox v. Citizens' Bank & Trust Co.*, 37 S. W. Rep. 1102 (Tenn.). See NOTES.

CARRIERS—RIGHT OF CONSIGNOR TO SUE FOR LOSS.—*Held*, that a consignor cannot maintain an action against a common carrier for loss of goods without averring ownership, or some special interest in the property. *Union Pac. Ry. Co. v. Metcalf*, 69 N. W. Rep. 961 (Neb.).

Carriers were originally liable to the bailor only. It was a duty to answer to him from whom they had gotten possession. The owner's right to obtain the property from the bailees, without leaving him still responsible to the bailor, was a later development. Jones on Bailment, 53, note. This liability to the bailor was always *ex delicto*. The right of the bailor in contract originated in *Dale v. Hall*, 1 Wils. 281. In time there was a tendency to confine the consignor to his action on the contract; and now there is considerable authority to deny him even that. See cases in Hutchinson on Carriers, 2d ed., § 731. But as the weight of authority is that the consignor can sue on the contract, and can recover full value of the goods, either for himself or for the owner, whom he is supposed to represent (*Id.*, § 727), there seems to be a recognition of his right of control over the goods which would properly give him an action on the possession in tort. *Blanchard v. Page*, 8 Gray, 281.

CONFLICT OF LAWS—CONTRACTS RELATING TO LAND.—Bill by the representative of a wife to enforce a covenant of the husband to surrender all his marriage interest in the wife's lands situated in Massachusetts. In that State husband and wife cannot contract; in South Carolina, where the covenant was made, the law is otherwise. Demurrer, on the ground of incapacity, overruled. *Folsom v. Stewart*, 45 N. E. Rep. 757 (Mass.).

It was admitted that a deed surrendering the husband's rights would have been invalid, for the law of the *situs* governs such instruments. Field, C. J., dissenting, held

that the same ought to be true of a contract to convey. Such a view can be supported only on the theory that the transfer of land so closely concerns the State where it is situated that all contracts relating thereto must conform to its law. It is on this principle that actions of trespass to real property are not allowed outside of the State where the act was committed. See Story, *Conflict of Laws*, §§ 554, 555. But there would seem to be no advantage in holding to such a strict rule. Husband and wife are allowed in Massachusetts to bring about the result they desire by a conveyance to trustees on trusts properly limited. What is objectionable in decreeing specific performance of the same act?

CONSTITUTIONAL LAW—EQUAL PROTECTION OF THE LAW.—The State of Texas passed a statute, providing that, if a railroad corporation should fail to pay claims for less than \$50, within thirty days after presentation, such corporation should be liable for an attorney's fee of \$10, provided the claim was supported by affidavit and was prosecuted to a successful termination in the courts. *Held*, the statute is unconstitutional in that it denies to railroad companies the equal protection of the law. Fuller, C. J., Gray and White, J. J., dissenting. *Gulf, C., & S. F. Ry. Co. v. Ellis*, 17 Sup. Ct. Rep. 255.

This would seem to be an unfortunate decision. The doctrine of the United States Supreme Court in this class of cases is that class legislation is not unconstitutional so long as it rests on some reasonable basis and affects all persons alike within the sphere of its operation. *Barbier v. Connolly*, 113 U. S. 27; *Northern Pac. R. R. Co. v. Mackey*, 127 U. S. 205. This is admitted by the majority of the court, but they rest their decision on the ground that the statute in this particular case is wholly arbitrary and unreasonable. Such a view is extraordinarily narrow. The legislation in question simply concerned costs in certain civil actions, and, as is pointed out by Gray, J., in his dissenting opinion, costs have always been a legitimate subject for legislative action. See *Lowe v. Kansas*, 163 U. S. 81. Further than this, as there is nothing in the statute to show that the legislature was acting from wrong motives, it may well be that it appeared to that body that the railroads were unduly resisting the payment of small claims. If that were so, (and it was entirely a question for the legislature to decide,) then its action in the present case cannot be called arbitrary class legislation. Statutes to the same effect have been upheld in the State courts. *Vogel v. Pekoc*, 157 Ill. 339; *Cameron v. R. R. Co.*, 65 N. W. Rep. 652 (Minn.); *R. R. Co. v. Dey*, 82 Iowa, 312.

The principal case is also interesting in deciding that a corporation is a "person," within the meaning of the Fourteenth Amendment. There have been many *dicta* to that effect, but few, if any, decisions.

CONSTITUTIONAL LAW—INSURANCE POLICY—EXEMPTION FROM DEBT.—A statute providing that a policy of life insurance, in the absence of an agreement to the contrary, shall inure to the benefit of husband or wife independently of creditors, and that an endowment policy payable to the assured, on the attainment of a certain age, shall be exempt from liability for his debts, *held* to violate a constitutional provision exempting from forced sale "a reasonable amount of personal property, the kind and value of which is to be fixed by general laws." *Skinner v. Hoyt*, 69 N. W. Rep. 595 (N. Dak.).

This decision is a wholesome one, and, from the similarity of such exemption clauses in various State constitutions, is of considerable interest. The tendency of some of our Western legislatures has been to pass laws far too generous to debtors to be just. A comparatively recent decision to the same effect is *How v. How*, 61 N. W. Rep. 456 (Minn.).

CONSTITUTIONAL LAW—THIRTEENTH AMENDMENT.—The Revised Statutes provide that deserting seamen may be taken before a justice of the peace and by him committed to jail, to be delivered to the master on the sailing of the vessel, or sooner on demand. *Held*, that these provisions are constitutional. *Robertson v. Baldwin*, 17 Sup. Ct. Rep. 326. See NOTES.

CONTRACTS—GAMING—RECOVERY OF MONEY LOANED TO PAY LOSSES.—Where a member of a club was interested in the "take out" from all bets made in a poker game played in the club rooms, to the extent that such "take out" was used in paying for the expenses of the club and the purchase of drinks and meals for the members, *held* he is such a participant in the game, though not an actual player, as to prevent his recovery of money paid out at the request of another member in settlement of his losses at the game. *White v. Wilson's Adm'rs*, 38 S. W. Rep. 495 (Ky.).

In general, money loaned to pay for losses at cards, after the losses have been incurred, is recoverable. *McKinney v. Pope's Adm'rs*, 3 B. Mon. 93. But, as in the principal case, where the parties are *in pari delicto*, the rule is otherwise. Keener on Quasi-Contracts, 268. Although it seems rather a refinement to say that the defendant

was a participant in the game, yet the decision seems a sound one, considering the well known tendency of courts when dealing with gaming contracts. In carrying on the gaming establishment, as set out above, the parties were joint wrongdoers. *Triplett v. Seelbach*, 91 Ky. 30. True, the defendant was the more culpable of the two, but it is the community of interests that makes wrongdoers responsible for the whole wrong. See, on the subject of gaming contracts, Greenhood on Pub. Pol., 96 *et seq.*

CORPORATIONS — LEGISLATIVE POWER TO AMEND CHARTERS. — The legislature, under a general statute reserving a power to amend corporation charters, had authorized a lease, provided two thirds of the stockholders consented. *Held*, that the legislature could not bind dissenting stockholders. *Dow v. Northern R. R. Co.*, 36 Atl. Rep. 510 (N. H.). See NOTES.

EVIDENCE — ANCIENT DOCUMENTS. — Upon a deed of marriage settlement being offered in evidence, it appeared to be signed "S, per R." The deed was over forty years old. It appeared that S had power to dispose of the property in controversy among her children, as she might think right, and that the grantee in the deed was one of her children. *Held*, that although the proper execution of the deed would be presumed after the lapse of so great a time, the court would not presume that the power had been properly exercised. *In re Airey*, (1897) 1 Ch. 164.

The case is clearly right. The power was one which involved the exercise of personal discretion by the donee, and hence it could not be delegated. Farwell on Powers, 2d ed., 441. If, however, the power is merely ministerial, the general opinion seems to be that, where an ancient deed executed by an attorney is offered in evidence, the court will presume that the attorney had authority. *Doe d. Clinton v. Phelps*, 9 Johns. 169.

EVIDENCE — CONTRADICTION OF DYING DECLARATIONS. — *Held*, that previous statements of deceased not admissible under any of the exceptions to the hearsay rule may come in to impeach a dying declaration already admitted. *Carver v. United States*, 17 Sup. Ct. Rep. 228. See NOTES.

EVIDENCE — ENTRY IN THE FAMILY BIBLE. — In an action on an insurance policy, *held* that an entry of the date of birth of insured in his family Bible is admissible to show that the date given by him in his application was false, though the entry was not made by a member of the family. *Union Cent. Life Ins. Co. v. Pollard*, 26 S. E. Rep. 421 (Va.).

The general rule, in cases of pedigree, is that the declaration or entry should have been made by a member of the family. When the entry is made in the family Bible, however, this is not required, the presumption being that the family have adopted and given authenticity to the entries. *Moulston v. Atty. General*, 2 Russ. & M. 147. But the admissibility of such evidence presupposes a question of pedigree, that is, of legitimate relationship. In the principal case no such question arises, but merely a controversy as to the time of birth. Some of the American courts have a very loose doctrine as to pedigree, admitting declarations and entries of this sort whenever the time or place of birth is involved. Such evidence on these points is admissible only when they arise incidentally in a question of pedigree. The laxer doctrine is said to be traceable to the omission of this qualification (afterwards corrected) in the first edition of Greenleaf on Evidence. See Thayer's Cas. on Ev., 408, n. 1. In England, as in Massachusetts, the evidence offered in the principal case would have been excluded.

EVIDENCE — POST-TESTAMENTARY DECLARATION. — *Held*, declarations made by a testator after the date of an alleged will are not admissible to prove the execution of the will. *Atkinson v. Morris*, [1897] P. 40. *Held*, the contents of a lost will cannot be proved solely by the declarations of the testator. *Clark v. Turner*, 69 N. W. Rep. 843 (Neb.).

The results reached in both cases are undoubtedly correct, but the opinions in each illustrate the persistent misconception to which the case of *Sugden v. St. Leonards*, 1 P. D. 154, has been subject. In each it is said that it was decided in *Sugden v. St. Leonards* that post-testamentary declarations are admissible to prove the contents of a will. The English court says the principle of that case does not extend to the execution of a will, and the American court that such declarations are admissible only as corroborative evidence. The truth of the matter is that *Sugden v. St. Leonards* decided nothing whatever with regard to post-testamentary declarations. There was direct testimony in the case, which the judges declared sufficient. The remarks made by Jessel, M. R., on the admissibility of post-testamentary declarations were therefore *dicta*. The opinion of Mellish, L. J. (at p. 251), puts the matter in its true light, in showing that such declarations have not yet been recognized as exceptions to the rule against hearsay.

EVIDENCE—PRESUMPTION OF INNOCENCE.—*Held*, a charge to the jury in a criminal case, that the defendant is presumed to be innocent of all the charges against him until he is proven guilty and that this presumption remains with him until his guilt is proved beyond a reasonable doubt, is correct, and the judge need not tell the jury that the presumption is to be regarded as matter of evidence. *Agnew v. United States*, 17 Sup. Ct. Rep. 235. See NOTES.

EVIDENCE—RES JUDICATA.—*Held*, where the fundamental inquiry in a suit in equity was whether plaintiff or defendant owned certain bonds, and the bill was dismissed, but the decree did not show the grounds of dismissal, the presumption is that the issue was disposed of on its merits, and the question of ownership is therefore *res adjudicata*. *Marston v. Evans*, 36 Atl. Rep. 258 (Md.).

The intention of the defendant was, that the opinion of the judge dismissing the bill should be consulted to discover whether the decree was dismissed on the merits of the issue or for lack of jurisdiction. But if this were allowed the court would often have to pass upon all the various shades of expression used by the decreeing judge, an inquiry which would be perplexing and unsatisfactory. The decision is barred on the broad ground that it is for the interest of the public that there should be an end of litigation. If the decree was given for lack of jurisdiction, it should have been qualified by the words "without prejudice." In the absence of such words it should be construed as what it purports to be, a decree on the merits of the issue. *Durant v. Essex Co.*, 7 Wall. 107.

EVIDENCE—VIOLATION OF WITNESS'S PRIVILEGE—NEW TRIAL.—A witness was erroneously compelled to testify, in spite of his claim of privilege on the ground that his evidence would tend to incriminate him. *Held*, that this is not ground for exception. *Samuel v. The People*, 45 N. E. Rep. 728 (Ill.).

This is supported by *Marston v. Downes*, 1 A. & E. 31, *Regina v. Kinglake*, 11 Cox C. C. 499, and the language of *Cloyes v. Thayer*, 3 Hill, 564, *Clark v. Reese*, 35 Cal. 89, and *State v. Foster*, 23 N. H. 348. It is true, as these decisions reason, that the privilege is purely for the benefit of the witness, and if he waives it neither party can complain. On the other hand, as the evidence here has been brought into the case in violation of a rule of law, it is hard to see how it can be "held that the verdict was supported by legal evidence." *Shaw, C. J.*, in *Com. v. Kimball*, 24 Pick. 369, cited with approval in *Com. v. Shaw*, 4 Cush. 594, and *State v. Hopkins*, 23 Wis. 319.

PERSONS—HUSBAND AND WIFE—WIFE'S POWER TO ACQUIRE A DOMICIL.—A husband, domiciled in Massachusetts, abandoned his wife; the wife removed to New Hampshire intending to make her home in that State. *Held*, the wife acquired a New Hampshire domicile. *Shute v. Sargent*, 36 Atl. Rep. 282 (N. H.).

One who is "under the power and authority of another person has no right to choose a domicile." Story, Conflict of Laws, § 46. On marriage the wife, at common law, came under the control of the husband; she acquired his domicile. If the husband acquired a new domicile, his new domicile became that of the wife. The wife during coverture could not by her own act acquire a new domicile. It is in England an open question whether, after a judicial separation, the wife can acquire a domicile apart from that of her husband. *Dolphin v. Robins*, 7 H. L. Cas. 390, at p. 420.

In this country a much more liberal rule seems to prevail. It is said that the Married Women's Acts establishing the wife's right to her property free from the control of her husband, and giving to a married woman the right to contract, have changed, at least to some extent, the strict common law rule that the wife cannot acquire a domicile by her own act. *Matter of Florance*, 54 Hun. 328. The reason advanced does not inevitably lead to the result reached.

PRACTICE—NEW TRIAL—NEWLY DISCOVERED EVIDENCE.—In an action for personal injuries the plaintiff had a verdict. The defendant moved for a new trial on the ground of newly discovered evidence; (1) impeaching the plaintiff's witnesses, (2) clearly showing that plaintiff when before the jury simulated his physical condition to be worse than in fact it was. *Held*, the newly discovered evidence on the first point was not ground for a new trial, but that on the second point entitled defendant to a new trial. *Corley v. R. R. Co.*, 42 N. Y. Supp. 941.

The case is sound on both points. The successful party's fraud in keeping away the witnesses of the other party, or in procuring false testimony to be given, has always been good ground for a new trial. 2 Tidd's Practice, 937. Here the plaintiff's pretended injuries were false evidence calculated to mislead the jury in estimating damages. In the absence of misconduct on the part of the successful litigant the old rule seems to have been that newly discovered evidence showing one of the successful

party's witnesses to have been mistaken as to the facts testified to was not ground for a new trial. *Huish v. Sheldon*, Sayer, 27. But a much fairer rule now seems to prevail. If it can be clearly shown that one of the witnesses for the successful party perjured himself as to a material point, or was clearly mistaken as to the facts on which his testimony was based, a new trial will be granted. *Lister v. Mundell*, 1 Bos. & Pul. 427; *Richardson v. Fisher*, 1 Bing. 145. A clear case must be made out, however, to entitle a party to a new trial on this ground; evidence merely tending to discredit a witness's testimony does not come up to the required standard. *Holtz v. Schmidt*, 12 Jones & Sp. 327; *Bunn v. Hoyt*, 3 Johns. Ch. 255; *People v. McGuire*, 2 Hun, 269.

PROPERTY — APPORTIONMENT OF RENT. — Plaintiff leased to defendant land upon which were certain buildings. The buildings were destroyed by a hurricane. *Held*, that defendant is entitled to an apportionment of the rent accruing after the destruction of the buildings. *Wattles v. South Omaha Ice & Coal Co.*, 69 N. W. Rep. 785 (Neb.).

The court concede that this decision is contrary to the established rule of England and America; note to *McMillan v. Solomon*, 94 Am. Dec. 654; and is supported by only one case, *Whittaker v. Hawley*, 25 Kan. 674. They justify this departure from the common law largely on the ground that in interpreting contracts they are to give effect to the intent of the parties. The logical result of their reasoning, as is pointed out by the dissenting judges, would be to abrogate most of the technical rules of property and contracts. If the common law on this point has outlived its usefulness, as the court evidently believes, it should be modified by a statute, which would affect only the evil to be corrected, rather than by a decision which may prove so embarrassing a precedent.

PROPERTY — COVENANT RUNNING WITH THE LAND. — Defendant deeded certain premises to A, covenanting that the land was free from encumbrances. By mesne conveyances, the premises became vested in X. It appeared that the land was encumbered at the time of the delivery of the deed by defendant. X, the remote grantee, purported to assign to plaintiff all right of action for damages for the breach of defendant's covenant. *Held*, that, although the covenant was broken upon the delivery of the deed by the defendant, yet, under the Code allowing the assignment of choses in action, the covenant ran with the land, so that the right to sue upon it vested in X, and by his assignment in the plaintiff. *Clarke v. Priest*, 42 N. Y. Supp. 766.

The ground of the decision is, that as it is said in the cases that such covenant does not run with the land, because upon the delivery of the deed it is immediately broken, thus becoming a chose in action, which cannot be assigned (*Clark v. Swift*, 3 Met. 390), therefore, when a statute allows the assignment of choses in action it will pass with the land. This reasoning is hardly satisfactory. The better view would seem to be that the statute was intended only to cover express assignments. Even if it were extended to implied assignments, however, it seems difficult to gather from the words of a deed of land an intention to pass a chose in action.

PROPERTY — DAMAGES FOR CUTTING DOWN TREES. — An action was brought to recover damages for the cutting down and taking away of trees. *Held*, the measure of damages, where a trespasser has acted in good faith, is the value of the trees as standing timber. *Clerk v. Holdridge*, 43 N. Y. Supp. 115.

The court here follow the case of *Woodenware Co. v. U. S.*, 106 U. S. 432. *Silbury v. McCoun*, 3 Comst. 379, is an analogous decision. It does not seem correct in these cases to make the measure of damages depend on the good or bad faith of the tortfeasor. A court, if it wishes to punish a defendant, should give exemplary damages; but it ought not to judge the actual loss of the plaintiff by the defendant's motive. In this class of cases, it would seem that damages should be assessed at the value of the real estate when it first becomes a chattel. Perhaps in the case of trees a plaintiff should recover their value as standing timber, whenever the trees are more valuable when standing than they can be after being cut down.

PROPERTY — FAILURE OF CONSIDERATION FOR CONVEYANCE — KNOWLEDGE BY GRANTOR THAT SUCH FAILURE MIGHT OCCUR. — When land was deeded in fulfillment of a supposed marriage contract between grantor and grantee, the long absence of a former husband of grantee being known to both parties, *held*, that the grantor's heirs cannot recover the land as deeded under a mistake of fact when the former husband turned out to have been alive. *Ogden v. McHugh*, 45 N. E. Rep. 731 (Mass.).

A gift by will in such a case, where there was no fraud, could not be impugned. *Giles v. Giles*, 1 Keen, 685. 2 Jarman on Wills, 4th ed., 53, n. And though the grantor might have refused to perform this transfer if he had discovered the fundamental error (Pollock on Contracts, 6th ed., 479), yet his voluntary completion of it, knowing that it might not be obligatory, could hardly be less binding than a gift.

PROPERTY — MORTGAGES — PURCHASE OF EQUITY OF REDEMPTION BY MORTGAGEE. — An equity of redemption was admittedly worth \$45,500. The mortgagee in possession, intending to pay this sum if he could not get it for less, and knowing of the distress of the mortgagor, threatened to have the mortgage foreclosed, if the mortgagor would not sell her equity for \$19,000, which she did. In an action brought to set aside the sale, *held*, that the mortgagee might purchase the equity of redemption as cheaply as he could get it. *De Martin v. Phelan*, 47 Pac. Rep. 356 (Cal.).

Although doubted in the earlier cases, it is now generally admitted that there is no such fiduciary relation between mortgagee and mortgagor as will preclude the mortgagee from buying the equity of redemption from a mortgagor. *Ten Eyck v. Craig*, 62 N. Y. 406. But that he may purchase at so great a sacrifice is an entirely different question. No authority is cited by the principal case, and there is little if any authority to be found in the books in support of the decision. Transactions of this nature should be very carefully scrutinized by the courts; and inasmuch as a mortgagee in possession may exercise an undue influence over the mortgagor, especially if the latter is in needy circumstances, it seems only just that measures to prevent any oppression of the debtor should be taken. *Pugh v. Davis*, 96 U. S. 332; *Oliver v. Cunningham*, 7 Fed. Rep. 689. The fairness of the transaction must distinctly appear; *Holdridge v. Gillespie*, 2 Johns. Ch. 34; and the consideration must be an adequate one. *Russell v. Southard*, 12 How. 154. See also Jones on Mortgages, §§ 711, 712, citing many cases *contra* to the principal case.

PROPERTY — MORTGAGES — VOID CONVEYANCE OF FULL LEGAL TITLE BY MORTGAGEE. — *Held*, that, where the mortgagee purchases the land at a void foreclosure sale, a deed by him which purports only to convey the legal title to the land has the effect of an assignment of the mortgage. *Smithson Land Co. v. Brantigan*, 47 Pac. Rep. 434 (Wash.).

This is one of a large class of cases in which a purchaser whose title fails or becomes worthless gets the benefit of a right of the vendor though he did not know of its existence. Several analogous cases may be mentioned. When a note secured by a mortgage is sold, the benefit of the mortgage goes with it, though unknown to the purchaser. Jones on Mortgages, § 817. The purchaser at a void tax sale gets the benefit of the State's tax lien on the land. *Reed v. Kalfsbeck*, 45 N. E. Rep. 476. One who buys bonds which turn out to be void is allowed to enforce the rights of the original purchaser arising from failure of consideration. *Tracy v. Talmage*, 14 N. Y. 162; *Irvine v. Comm'rs*, 75 Fed. Rep. 765. While the word assignment is often used in such cases, a more strictly logical explanation seems to be that equity will relieve from accidental loss by making the seller a constructive trustee of his rights for the benefit of the buyer. This is very closely allied to the theory of subrogation, by which the creditor is made constructive trustee for the surety.

PROPERTY — RULE AGAINST PERPETUITIES. — The testator devised land to his grandchildren, and directed that trustees should invest the residue of his estate in a house, to be built on the land whenever the city determined a certain question of grading. *Held*, that the grandchildren could elect to take the money at once, and therefore the rule against perpetuities did not apply. *In re Rogers' Estate*, 36 Atl. Rep. 340 (Penn.).

The question is similar to that considered in 10 HARVARD LAW REVIEW, 446, whether a power of sale, which trustees may exercise for an indefinite time, is without the rule against perpetuities where the equitable fee is in a class. If in the principal case there had been but one donee, the money would have been at once in his absolute control. Thus the main object of the rule against perpetuities would have been satisfied, to prevent an interest from being uncertain for a long period, and thereby much lessened in value. Gray on Perpetuities, § 269. But here to get the fund the consent of all the grandchildren must be obtained, and if there are many this may be practically impossible. But what difficulty there is is practical, not theoretical, and it would hardly seem wise to say that in every case where the gift was to more than one the rule against perpetuities should apply. No other line could be drawn in determining whether or not the interest was really in the control of each donee, and the decision of the court would therefore seem to be correct.

STATUTE OF LIMITATIONS — INTERRUPTION — WAIVER. — A legatee was indebted to his testator's estate for a sum larger than his legacy. He confessed judgment on this claim in favor of the estate. A judgment creditor of his sought to attach the property bequeathed him, on the ground that the claim upon which he had confessed judgment was barred by lapse of time, and that he had no right to waive the Statute of Limitations to the prejudice of his other creditors. It was contended by the estate that the running of the statute had been interrupted by the payment of an assignee's

dividend. It was *held*, that this last contention could not be sustained, but that no creditor could interfere to prevent his debtor waiving the Statute of Limitations in regard to other claims. *In re Sheppard's Estate*, 36 Atl. Rep. 422 (Pa.).

It has been held in England that the payment of a dividend in bankruptcy will not amount to a part payment by the debtor, so as to start the Statute of Limitations running afresh. *Davies v. Edwards*, 7 Exch. 22; *Ex parte Topping*, 34 L. J. Bank. 44. In this country, it has been held in *Campbell v. Baldwin*, 130 Mass. 199, that part payment must be voluntary, and in *McMullen v. Rafferty*, 89 N. Y. 456, that such payment can only be made by the debtor or his agent. The view taken in the principal case seems correct. As to the point of whether a creditor can intervene to prevent the waiver of statutory rights, it seems settled that he cannot. *Brookville Nat. Bank v. Kimble*, 76 Ind. 195; *Allen v. Smith*, 129 U. S. 465.

TORTS — LIABILITY FOR BREACH OF CONTRACT WITH THIRD PARTY. — The defendant railroad company under a through traffic arrangement delivered to the Lake Shore Railroad a car. The car was defective, — the defect being of such nature that it might have been readily discovered by a reasonably careful inspection. Plaintiff, a brakeman on the Lake Shore, was injured in consequence of this defect. *Held*, plaintiff may recover his damages from defendant. *Penn. R. R. Co. v. Snyder*, 45 N. E. Rep. 559 (Ohio).

This is one of a rapidly increasing line of cases in which one who carelessly furnishes a defective chattel to be used for a certain purpose is held answerable in damages to one of a class who might be expected to use the chattel, and who in using it for the purpose for which it was intended, is injured in consequence of the original defect. Another recent case of this description is *Glenn v. Winters*, 40 N. Y. Supp. 659. The action sounds in tort, and is totally independent of any contractual duty. The reasoning on which the liability in tort is to be supported may be found in the opinion of Brett, M. R., in *Heaven v. Pender*, 11 Q. B. D. 503. The liability of defendant in such cases is not, however, universally admitted. *Zieman v. Mfg. Co.*, 63 N. W. Rep. 1021.

If it be admitted that defendant is under a duty to that class of which plaintiff is a member to use care in providing a sound car, the intervening carelessness of a third person is immaterial, even where the careless third party is plaintiff's employer, who is himself liable in tort to plaintiff. *Moon v. R. R. Co.*, 46 Minn. 106.

TORTS — PREVENTING ENFORCEMENT OF DECREE. — *Held*, that an action will lie by a wife, in whose favor alimony has been decreed pending divorce proceedings, against one who has induced and aided the husband to leave the State, in order to avoid the payment of the alimony. *Hoefler v. Hoefler*, 42 N. Y. Supp. 1035. See NOTES.

TORTS — SUIT BY ADMINISTRATOR — CONTRIBUTORY NEGLIGENCE OF THE BENEFICIARIES. — By statute the administrator may sue, when the deceased himself might have done so. *Held*, that no damages would be given for the benefit of those beneficiaries whose negligence contributed to the accident, where the amount due each beneficiary could be respectively apportioned by the jury. *Wolf v. Lake Erie & W. R. R. Co.*, 45 N. E. Rep. 708 (Ohio).

The case is particularly interesting for a *dictum*, in which the court say that, if the amount must have been recovered in a lump sum, the negligent beneficiaries would be entitled to their share. The reason given is sound, namely, that it is better that the innocent beneficiaries should recover, even though the guilty get what is undeserved, rather than that the innocent should be deprived of their right because their co-beneficiaries were negligent. *Ry. Co. v. Crawford*, 24 Ohio St. 631. Although there has been some doubt in regard to the actual question decided in this case, (see *Wymore v. Mahaska County*, 78 Iowa, 396, *contra*.) the weight of authority and better opinion are in accord with this decision. *Ry. Co. v. Snyder*, 24 Ohio St. 670; *Penn. Co. v. James*, 81½ Pa. St. 194; *Williams v. Ry. Co.*, 60 Tex. 205; *Bamberger v. Ry. Co.*, 31 S. W. Rep. 163; *Beach on Contrib. Neg.*, § 44. See also *Tiffany on Death by Wrongful Act*, §§ 69, 70, and 9 HARVARD LAW REVIEW, 282.

TRUSTS — LAND HELD IN TRUST TO SECURE A NOTE — CONVEYANCE BY TRUSTEE. — The owner of a piece of land executed a note, secured by a trust deed on the property. The note was for the accommodation of the payee, who paid it at maturity, and afterwards reissued it, having in the mean time acquired the equity of redemption in the land. Thereafter he conveyed the land, and also induced the trustee to join in a conveyance of the land, reciting the payment of the note, which was duly recorded. The land came by mesne conveyances to plaintiffs. At the request of the holder of the note, notice of sale under a power contained in the trust deed was given. On a bill to enjoin the sale, *held*, that the subsequent purchasers of the land took it subject to the trust for the payment of the note. *Kelly v. Stated*, 37 S. W. Rep. 1110 (Mo.).

The decision is clearly correct, as the trustee was not empowered by the deed or by statute to convey the land, but it suggests a practical difficulty in the use of such trust deeds for the security of money, which have almost entirely superseded mortgages in some parts of the country. Such instruments are resorted to, not only because the power of sale contained in them obviates the necessity of a suit in equity to foreclose, (2 Amer. Law Reg. N. s. 645,) but also for the ease of transfer of the notes secured by them without a formal assignment of the instrument on the record, as in the case of a mortgage. But where no power of conveyance is conferred on the trustee, any subsequent purchaser of the land, even under an apparently clean record title, takes at the peril of the trust having been satisfied and the debt duly paid, for he has notice of the trust through the deed. Where, however, the other alternative is adopted, and a statute exists, giving the trustee power to convey, or the trust deed confers such power, a *bona fide* purchaser taking under a clean record is protected, even though the conveyance was executed while the debt was still unpaid. *Porter v. McNabney*, 77 Ill. 235.

REVIEWS.

HANDBOOK OF THE LAW OF PRIVATE CORPORATIONS. By William L. Clark, Jr. St. Paul: West Publishing Co. 1897. (Hornbook Series.) pp. xii, 729.

Like Mr. Clark's preceding work on Contracts, his new book on Corporations is a good one, — above the average of legal text-books in professed "student's series." It states the prevailing law with admirable conciseness, but, like the other "Hornbooks," it is almost entirely devoid of discussion of principle or suggestions of doctrine, things one would think quite necessary to a student. For instance, the statement that most courts hold would-be incorporators who have failed to become a corporation as partners, ought to receive more criticism than an acknowledgment that some courts do not. The section devoted to the "trust fund" theory is a happy exception to this defect, and the author's comment on the decisions here is very satisfactory.

It is refreshing to read Mr. Clark's positive statement that the rights of *de facto* corporations do not rest on the overburdened doctrine of estoppel. One is surprised after this to find estoppel invoked to account for corporate rights under partly performed *ultra vires* contracts. Accurate critics have pointed out that an individual defendant has in no wise misled a plaintiff corporation in regard to its own charter powers, and that no proper estoppel can therefore exist.

In common with other more pretentious works on the subject, the topic of the liability of assenting corporators for torts or *ultra vires* contracts of a corporation has been entirely ignored. The effect of stock subscriptions is well treated by the author. Appended to the text is a brief essay by Benjamin Trapnell, on "The Logical Conception of a Corporation," that is well worth reading. The very rational view taken of the "artificial person" is that "corporate 'identity,' in spite of changes in component parts, means simply the persistence, unchanged in point of proportion or remedy, of all rights and liabilities existing between the several members of the association, and between them and third persons."

J. P. H.

THE HISTORICAL DEVELOPMENT OF CODE PLEADING IN AMERICA AND ENGLAND. By Charles M. Hepburn, of the Cincinnati Bar. Cincinnati: W. H. Anderson & Co. 1897. pp. xvi, 318.

Mr. Hepburn is an ardent advocate of the merits of code pleading, or this book would not have been written. His arraignment of special pleading is very severe; but that the conclusions he reaches are based on a careful historical study of the matter is clear. The inadequacy of common law pleading is attributed to the fact that development was entirely arrested in its early stages, while the substantive law continued its wonderful growth unchecked. This produced an "inveterate incongruity between our procedure and our substantive rights." This it was that gave force to the movement in this century for a reform of procedure. It is interesting, however, to notice a similarity between the course of code pleading and of common law pleading. A failure to act according to the spirit of the codes has produced a system that is now exceedingly technical in many respects, due largely to a conservative following of forms, while Mr. Hepburn himself points to a case of about 1292 as a model of the simplicity and directness that code pleading should attain: "One Alice brought a writ of debt against B., for that she gave him twenty pounds worth of chattels by reason that he was to marry her; and he did not marry her."

The adoption of the reform met the greatest opposition in the conservative spirit of the profession. New York's code was the first, and it became the model for the others that have followed in this country. The commissioners who drafted it did their work in five months, and the legislature quickly enacted it into law, to give the reform a firm standing before the opposition could effectively organize for its defeat. Such a code could not be perfect, even if perfection is ever to be expected. Though the necessary amendments have been numerous, they have not been in regard to matters of the greatest importance; and Mr. Hepburn considers the success of the code to have been greater than could fairly be looked for.

The development of the reformed procedure in this country is treated in its three phases, of the development in the *code states*, twenty-seven in all, in the *quasi-code states*, and in the *federal courts*. Then there is the very different development that has taken place in the British Empire. A knowledge of the latter cannot but prove instructive, and probably but little is known as to it on this side of the water. For instance, see the provisions to secure expedition and brevity (p. 211 *et seq.*), which are apparently much more effective than anything that has been devised here.

The statement that code pleading is as much a science as common law pleading is undoubtedly true. The pleader must understand the essentials of his case as thoroughly as ever, or he cannot hope to frame a perspicuous complaint. But this has not been the practice. Attorneys have found it more convenient to intrench themselves behind really immaterial allegations, which *might* help them out, than to give careful study to a case; and so the objects of reform have been largely defeated. If, then, code pleading has come to stay, (and this can hardly be doubted, for see page 131 as to the movement for reform in New York,) every professional man should understand the questions involved in a system of code pleading, or he cannot co-operate in and appreciate the work of reforming present systems. To take one out of the narrow path of prac-

tice under a particular code, and give an idea of the importance of this branch of the law as a science, Mr. Hepburn's book will be found an instructive and interesting guide.

E. S.

HANDBOOK OF THE LAW OF PARTNERSHIP. By William George. St. Paul: West Publishing Co. 1897. (Hornbook Series.) pp. xi, 606.

Text-books have been written in the words of the courts, but it has remained for this author to produce a book largely in the words of another writer on the same subject. In his Preface he says: "In gathering material for the text, more or less aid has been received from the pages of Story, Collyer, Parsons, and others, while very copious use has been made of the great work of Lord Lindley, the natural resort for all investigators into this branch of the law." This is no more than an acknowledgment of the indebtedness every member of the profession is under to those who have gone ahead of him. In a cursory review of the book, however, such extensive and systematic plagiarism was discovered in the first sixty-five pages that it was thought unnecessary to go further. The worst instance noted is that on pages 17, 18, 19, and 20, the section on Consideration. The text is taken verbatim from Lord Justice Lindley's book. (See Lindley on Partnership, 5th Eng. ed., p. 63 *et seq.*) One of the six paragraphs under this topic is put in quotation marks and credit is given. Throughout the other five, figures referring to the notes are scattered. These notes are references to pages of Lindley on Partnership, put in just as a case would be cited to support a proposition of the author in the text. Again, under the Statute of Frauds, the text, beginning with the second sentence on page 21 and ending with the next to the last sentence on page 22, is taken bodily. (See Lindley on Partnership, 5th Eng. ed., p. 80 *et seq.*) In a note, referred to at the end of this passage, it is stated that "Lindley says that this is certainly going a long way towards repealing the Statute of Frauds." These exact words are in Lindley's work, just after the passage inserted in the text. There is no necessity for mentioning the numerous other instances that have been noticed.

E. S.

DIGEST OF INSURANCE CASES. Volume IX. For the year ending October 31, 1896. By John A. Finch, of the Indianapolis Bar. Indianapolis and Kansas City: The Bowen-Merrill Co. 1897. pp. lvi, 405.

This Annual Digest contains 835 cases affecting the law of insurance, 135 cases more than that of last year. Nearly half of these involve questions of the construction of terms used in the policy, a fact which indicates, as the compiler points out, a very careless use of language by the companies. The plan of this volume is the same as that adopted in former years, and is admirably simple. There is no elaborate classification of subjects, nor any attempt to give cross references, in the body of the Digest; but the searcher is guided by a very complete Index.

R. G.

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